No. 75-679

In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERNAL REVENUE SERVICE, PETITIONER

v.

FRUEHAUF CORPORATION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

JOHN L. KING
MATTHEW C. MCKINNON
2600 Detroit Bank & Trust Bldg.
Detroit, Michigan 48226
MILTON J. MEHL
2012 Continental Life Bldg.
Fort Worth, Texas 76102
WILLIAM A. BARNETT
135 S. LaSalle Street
Chicago, Illinois 60603
GERALD C. RISNER
135 S. LaSalle Street
Chicago, Illinois 60603
GEORGE D. WEBSTER
1747 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Attorneys for Respondents

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QUESTIONS PRESENTED

I

WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT EXCISE TAX PRIVATE LETTER RULINGS, TECHNICAL ADVICE MEMORANDA, INDEX-DIGEST CARDS AND CERTAIN FILES, CORRESPONDENCE AND COMMUNICATIONS DO NOT CONSTITUTE TAX "RETURNS MADE" UNDER SECTION 6103(a)(2) OF THE INTERNAL REVENUE CODE AND, THEREFORE, ARE NOT MATTERS SPECIFICALLY EXEMPT UNDER 5 U.S.C. 552(b)(3)?

II

IF A RECORD, REQUESTED UNDER THE FREEDOM OF INFORMATION ACT, IS A PART OF OR SUPPLEMENTAL TO AN EXCISE TAX RETURN, SHOULD THE REASONABLY SEGREGABLE PORTION THEREOF BE PROVIDED TO THE REQUESTING PERSON AFTER DELETION OF THE EXEMPT PORTIONS?

STATEMENT OF THE CASE

The Internal Revenue Service, Petitioner herein (hereinafter IRS), seeks to set aside an order (A. 52) of the district court and affirmed by the court of appeals (A. 78), requiring it to deliver to respondents the following records:

1. Certain manufacturers excise tax private letter rulings;
2. Certain technical advice memoranda issued to excise taxpayers;
3. Files including correspondence, analysis, and submissions of fact applicable to the issuance of certain enumerated published excise tax revenue rulings;
5. Communications with respect to excise tax private letter rulings received by the IRS from persons outside the Executive Branch of the Government.

Respondents, after exhausting their administrative remedies, brought an action in the district court (A. 8) under the Freedom of Information Act (hereinafter FOIA or the Act), 5 U.S.C. § 552 (Appendix, *infra*, 73-75) to require the IRS to make available all of the documents set out in the order of the district court.

Crucial to the decision of this case is an understanding of the function and nature of the documents in issue in the context of the administrative process which generated them.

Liability for the manufacturers excise tax arises at the time of sale, and such tax is generally passed on at that time by the manufacturer to his customer.

Therefore, he must know whether an item is taxable and its proper tax base. When an excise tax issue is in dispute, if agreement cannot be reached with the IRS, the taxpayer must pay a tax and then sue for a refund in either the district court or the Court of Claims. The Tax Court has no jurisdiction over excise taxes, and consequently, there is a more limited body of excise tax case law. For these reasons, final opinions and interpretations of the excise tax law by the IRS contained in private letter rulings and technical advice memoranda should be disclosed since they constitute a body of secret law administratively relied upon by the IRS in its disposition of excise tax issues.

A. Description of Information Requested

1. The Private Letter Ruling System

A "ruling" is a written statement issued only by the National Office of the IRS to the taxpayer or his authorized representative that interprets and applies the tax law to a specific set of facts. The issuance of rulings is under the general supervision of the Assistant Commissioner (Technical)[1] (A. 39). Such rulings are generally referenced to as "private letter rulings."

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[1] The Assistant Commissioner (Technical) acts as the principal assistant to the Commissioner in providing basic principles and rules for the uniform interpretation and application of the Federal tax laws. Internal Revenue Manual (hereinafter I.R.M. or Manual) (11) 111, Appendix, *infra*, 78).

Part (11)631(1) of the I.R.M. provides:

> The Technical organization is charged with the interpretation of the provisions of the Internal Revenue Code, regulations, and related statutes with respect to all Federal taxes, other than alcohol, tobacco and certain firearms taxes.
>
> (a) The issuance of rulings by the Technical organization has been assigned to the following:

There are no instances in which the Internal Revenue Code of 1954 (hereinafter I.R.C. or Code) requires the issuance of a letter ruling as a condition of a particular manufacturers excise tax result.

However, any person may request an excise tax ruling. In excise tax matters, except excise taxes imposed under Chapter 42 of the I.R.C., the National Office issues rulings with respect to both prospective and completed transactions either before or after the return is filed (I.R.M. (11)616.2(3), Appendix, *infra,* 82-83). The function of an excise tax private letter ruling is to advise the requesting taxpayer regarding the treatment he may expect from IRS in the circumstances specified in the ruling (A. 28 and 31). A private letter ruling to a taxpayer should resolve fully all issues in language as nontechnical as the circumstances will permit, be technically accurate, legally sound, as concise as is feasible without sacrificing clarity and should contain an explanation of the rea-

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• • • •

2. Miscellaneous and Special Provisions Tax Division

• • • •

d. Excise Tax Branch;

• • • •

(b) The above Branches issue ruling or advisory memorandums as to the position of the Service that may be used as the basis for a determination of the tax consequences of specifically described transactions or other acts. The areas in which these Branches have jurisdiction are specified in I.R.M. 1113.9.

(c) The Technical Services Branch, Tax Forms and Publication Division, is authorized to reply to inquiries from taxpayers requesting general technical information.

sons for the conclusions reached if the ruling is adverse (I.R.M. (11)633.3(5), Appendix, *infra,* 83-84).

The IRS, since 1954, has issued approximately 10,000 so-called "reference" rulings and approximately 30,000 "routine" rulings in the area of manufacturers excise tax, but the IRS has selected, on the average, fewer than 175 of these rulings annually for publication in the Internal Revenue Bulletin (A. 28, 31 and 32).

For many years the IRS has used private letter rulings as legal precedent in the interpretation of the federal tax laws. As early as 1940, a committee headed by then Attorney General and former Chief Counsel of the IRS, Robert H. Jackson, found that unpublished private letter rulings

> are given virtually as much weight as published rulings despite the statement on the cover of the Internal Revenue Bulletin that "no unpublished ruling or decision will be cited or relied upon by any officer or employee of the Bureau * * * as a precedent in the disposition of other cases." Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, 77th Cong., 1st Sess. 68 (1941).

In 1961, Assistant Commissioner (Technical) Harold T. Swartz of the IRS affirmed this use (Supp. App. 124, 125, 175, 181).

Prior to 1967, private letter rulings were designated as "precedent" or "non-precedent." In 1967, the year the FOIA became effective, the names of the rulings were changed to "reference" and "routine," respectively (A. 32). John F. Simmons, Chief of the Manual and Field Conference Section, Technical Service

Branch, Technical Publications and Service Division of the IRS, testified on deposition in *Tax Analysts and Advocates* v. *Internal Revenue Service,* 362 F. Supp. 1298 (D.D.C., 1973), that the reason for the change was IRS believed that under the FOIA "precedent had to be published," and so "[w]e just changed the name of it." (Supp. App. 346)

The employees of the IRS who prepare private letter rulings are called Tax Law Specialists. They use, read and refer to previously issued private letter rulings, as well as the index-digest card files, in connection with their work of preparing private letter rulings (A. 30). These employees are responsible for determining which of the private letter rulings are to be classified as "reference" or as "routine" (A. 28 and 31).

2. The Technical Advice Memoranda Procedure

A technical advice memorandum is also prepared only in the National Office of the IRS by the Assistant Commissioner (Technical) (I.R.M. (11)712, Appendix, *infra,* 84). Like a private letter ruling, it is an interpretation and application of internal revenue laws, related statutes and regulations to a specific set of facts. Unlike a private letter ruling, the request originates from a district office of the IRS (I.R.M. (11)713, Appendix, *infra,* 84).

During the course of an excise tax examination, whether the audit of a return or a claim for refund, a taxpayer or his representative may request that a legal issue be referred to the Assistant Commissioner (Technical) of the National Office for technical advice on the grounds that a lack of uniformity exists as to the disposition of the issue or that the issue is

so unusual or complex as to warrant consideration (I.R.M. (11)721(2)(a), Appendix, *infra,* 85). If such a request is made, the examining officer or conferee initiates the action by furnishing the taxpayer with a copy of the statement of the pertinent facts and the question or questions proposed for submission. The taxpayer may submit a statement explaining his position on the issues, citing precedents that will bear upon the case.

The National Office of the IRS controls the issuance or nonissuance of requested technical advice memoranda. If an advice memorandum is issued, a copy is furnished to the taxpayer after it has been adopted by the District Director (I.R.M. (11)722.7 (1)(a), Appendix, *infra,* 85; A. 41).

A form for a technical advice memorandum issued by the National Office is set out in the Appendix, *infra,* 94.

Thus, while the procedures leading to the issuance of excise tax private letter rulings and technical advice memoranda may differ, they are identical in their nature and legal effect. Both are final opinions and interpretations of law on specific statements of facts which have been adopted by the National Office of the IRS and are not published in the Federal Register.

3. Index-Digest Card System

All of the private letter rulings and technical advice memoranda, regardless of their classification, are included in chronologic files, beginning in July, 1953. These files are not maintained by subject matter or Code section; however, the IRS maintains sets of cards in aphabetical order that separately index all

such files by taxpayer name and date. These cards are maintained, beginning in 1954, in sets of approximately five-year blocks (A. 31 and 43).

Reference index-digest cards involving excise tax are filed under index headings based on subject matter (A. 31 and 43), while routine index-digest cards involving excise tax are filed by case name. The typical reference index-digest card contains the taxpayer's name, the Code section involved, the date, a summary or digest of the issue involved and the decision reached (much like a "headnote"), an indication of the branch that issued the ruling and whether publication was recommended (I.R.M. (11) 244.2, Appendix, *infra,* 79-80).

Each index-digest card identifies the source document (A. 31 and 43). Where the source document is contained in a reference file a researcher may obtain it. The purpose of the cards is "to simplify research into a wide variety of source documents to determine the treatment in the documents of a *particular* issue, or *provision of law.*" (Emphasis added.) (I.R.M. (11)242. The index-digest cards are maintained "as an aid in researching Federal tax questions," and "to utilize prior research and to ascertain what interpretations have been made in other cases" (I.R.M. (11) 244.2, Appendix, *infra,* 79-80).

4. Documents Underlying Certain Published Revenue Rulings

Respondents have requested and the district court ordered production of the files including correspondence, analysis and submissions of fact applicable to the issuance of 23 specifically enumerated published

excise tax revenue rulings. The IRS offered no testimony, affidavits or evidence that such records were not available (A. 11, 12, 55 and 56). These published revenue rulings are all devoted to determinations of whether certain articles are subject to the manufacturers exicse tax under Section 4061 and determinations of price or constructive price under Section 4216 of the I.R.C. (Pet. Br. 5, n. 2).

All or some of the following documents are contained in an underlying revenue ruling file:[2]

1. A carbon copy of the ruling;
2. The request for the ruling;
3. A Rulings Publication and Distribution Memorandum which states whether the ruling should be digested or submitted for publication with reasons and citations to Treasury regulations or other unpublished rulings. It also contains a statement as to whether the ruling revokes or modifies any published rulings or confidential unpublished rulings (CUR's) that have precedent value;
4. A digest of the letter ruling, which is placed in the subject file and sent to field offices of the IRS along with a copy of the ruling;
5. General Counsel's Memorandum (GCM), which is a legal opinion of the Chief Counsel of the IRS on the legal issue involved in the ruling;
6. A request for reconsideration of the ruling as issued and a reconsideration and modification request to Chief Counsel;

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[2] Deposition of Harold T. Swartz, Assistant Commissioner (Technical) in *Allstate Insurance Co.* v. *United States,* 329 F.2d 346 (C.A. 7th, 1964); Supp. App. 115-165.

7. Correspondence between the IRS and the requesting taxpayer or his representative (A. 46).

5. Communicctions With Respect To Private Letter Rulings

Respondents also requested and the district court ordered the production of communications (including letters, conference memoranda and memoranda of telephone conversations) with respect to the requested excise tax private letter rulings, received by the IRS from persons outside the Executive Branch of the United States Government (including, without limitation, members of Congress, Congressional staff members and persons acting on behalf of the parties seeking rulings), together with the responses of the IRS to these outside communications (A. 12 and 56).

The IRS has argued generally that all records requested by respondents contain information which is either part of or related to returns filed by particular taxpayers (Pet. Br. 2). At trial, the IRS offered no evidence as to the information contained in these records and has not specifically discussed this request either in its brief in the court of appeals or this Court other than to state that if private letter rulings and technical advice memoranda are exempt under Section 6103, then the files pertaining to published letter rulings and the letter ruling indexing system are exempt (Pet. Br. 31 and 32).

B. Summary of Proceedings in This Case

Respondents are defendants in a criminal excise tax case in the United States District Court for the Eastern District of Michigan. In substance, the one count indictment charged that respondents, over a

nine year period from October 1, 1956 to December 31, 1965, had conspired to illegally lower the excise tax base on articles sold by respondent corporation, principally highway trailers. Contrary to the brief of the IRS at page 2, respondent corporation does not manufacture trucks. It paid approximately $96,000,000 in federal excise tax upon its sales for the period in question, whereas the indictment alleged that approximately $108,000,000 in tax was due and owing on these sales for that period.

On October 11, 1972, respondents, as defendants in said criminal action, in order to obtain the above described records which they considered vital to their defense, filed a motion for discovery and inspection and a motion for disclosure of exculpatory information.

In its memorandum and orders, dated June 21, 1973, the district court in denying these motions stated as follows:

> In the defendants' Motion for Disclosure of Exculpatory Information the defendants have made a request similar to that contained in paragraph 6 of their Motion for Discovery and Inspection. *In its response the Government concedes that* under Sec. 552(a)(3) of 5 U.S.C. (the Freedom of Information Act) the Internal Revenue Service records (except privileged or confidential trade secrets and commercial or financial information obtained from a taxpayer) are available to any person under proper request for identifiable records, and refers Defendants to 26 C.F.R. Sec. 601.702(c). (Emphasis added.)

Promptly thereafter, on June 26, 1973, respondents, in reliance upon the above referenced concessions

made by government counsel to the court, submitted a written request to the IRS to inspect and copy certain identifiable excise tax records as provided for in the FOIA.

Nearly one month later, on July 24, 1973, the IRS denied respondents' requests *in toto*, citing as authority 5 U.S.C. § 552(b)(3), (4), (5) and (7), (hereinafter Exemptions 3, 4, 5 and 7). Just six days later, on July 30, 1973, respondents appealed the July 24, 1973 denial to the Commissioner of Internal Revenue. Some three weeks later, on August 22, 1973, respondents' appeal was denied, and thus respondents had exhausted their administrative remedies. (Appendix, *infra*, 100, 113).

On September 14, 1973, this action was filed and respondents moved for a preliminary injunction. The IRS, in turn, moved for summary judgment claiming that all of the requested records were exempt from disclosure under Exception 3 of the FOIA, because of Section 6103 of the I.R.C. (A. 8, 33).

Respondents requested and received from the IRS certain admissions and answers to interrogatories (A. 27-32, 34-38). The IRS, in turn, requested and received from respondents answers to interrogatories.

The district court received evidence and heard arguments. The IRS argued Exemptions 3, 4, 5 and 7 as well as equitable considerations for denying disclosure of the requested records. At the trial, the IRS called no witnesses and presented no evidence as to the contents of any records requested by respondents or whether any such records had been filed as parts of any tax returns. It did submit three affidavits

generally discussing the system by which rulings are issued (A. 39-46). Respondents introduced into evidence a blank copy of an excise tax return (Form 720, Appendix, *infra,* 96-99) and parts of the I.R.M.

On January 11, 1974, the district court denied the motion of the IRS, ruling that respondents were entitled to disclosure of all requested records (A. 47-51) and entered an order thereon on January 30, 1974 (A. 52-57).

On February 4, 1974, the IRS filed an application for a stay pending appeal, and on February 7, 1974, the IRS filed a motion to alter or amend the January 30, 1974 order. The district court denied both motions on March 20, 1974. The IRS timely filed its notice of appeal on March 21, 1974. On April 9, 1974, the court of appeals, on stipulation of the parties to expedite the appeal, entered an order providing that until a final decision of the appeal of the matter by the court, all records and information referred to in the injunctive order of the district court need not be disclosed, but that the IRS must nevertheless continue to compile the requested information at the expense of respondent corporation (A. 3, 5). On June 9, 1975, the court of appeals affirmed (A. 6, 78-90). On January 12, 1976, this Court granted the petition of the IRS for writ of certiorari (A. 102).

C. Public Use of and Reliance on Private Letter Rulings

It has long been an established practice of both the courts and the IRS to utilize private letter rulings as evidence of the administrative practices of the IRS and its interpretations of the I.R.C.

In *Allstate Insurance Co.* v. *United States*, 329 F. 2d 346 (C.A. 7th, 1964), the IRS placed in evidence as exhibits a number of private letter rulings, requests for rulings and a request for reconsideraiton of ruling, issued over a 12 year period to show the existence of an unpublished administrative practice. In addition, the IRS read into the record a portion of a retained copy of a technical advice memorandum held by the IRS. The government relied on this administrative practice to show that Allstate and its parent corporation, Sears, Roebuck & Company, would have secured a ruling allowing them to file consolidated income tax returns had they requested one. They were not eligible, under Treasury regulations in existence at that time, to file consolidated income tax returns. The documents placed in evidence were complete and intact except for partial deletion of the names of the taxpayers and their representatives. Documents contained in the underlying ruling files were produced by the IRS and offered in evidence by Allstate.

In *Hanover Bank* v. *Commissioner*, this Court, set forth in a footnote, a private letter ruling issued by the IRS. 369 U.S. 672, 686-7, n. 20 (1962). In referring to it, the Court stated:

> . . . although the petitioners are not entitled to rely upon unpublished private rulings which were not issued specifically to them, such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws. And, because the Commissioner ruled, in letters addressed to taxpayers requesting them, that amortization with reference to a special call price was proper under the statute, we have further evidence that our

> construction of allowable bond premium amortization is compelled by the language of the statute. 369 U.S. 692, 686-7 (Footnotes omitted.)

The following argument was submitted on brief by the government to the district court in *Allstate Insurance Co.* v. *United States*, Supp. App. :

> It would certainly be wrong to say that such unpublished policies can never be proved in a court of law, because eminent authorities on federal taxation have pointed out that unpublished Service practice may often be crucial to the resolution of a tax problem. For example, Mr. Erwin Griswold, now Dean of the Harvard Law School, has stated unequivocally that "Treasury construction and practice * * * * may even appear, and quite plainly, in certain types of cases, *where no public ruling has been issued at all.*" Griswold, A Summary of the Regulations Problem, 54 Harv. L. Rev. 398, 417 (1941). (Emphasis added.) The Dean then goes on to say (Op. Ct. p. 418):
>
> Where the practice clearly appears, and where it has in fact been long continued, it should be given effect in the interests of sound tax administration. There should be no rule limiting the effect of administrative construction in all cases to formal regulations and Treasury decisions.

SUMMARY OF ARGUMENT

The lower courts in this case have found that excise tax private letter rulings and technical advice memoranda constitute final opinions and interpretations of the IRS within the meaning of Section 552(a)(2)(A) and (B) of the FOIA. They have also found that index-digest cards, as well as files including correspondence, analysis and submissions of fact applica-

ble to the issuance of certain enumerated published excise tax revenue rulings, and communications with respect to excise tax private letter rulings received by the IRS from persons outside the executive branch of the government are identifiable records under Section 552(a)(3). The IRS has not argued to the contrary, and therefore, it must be concluded that it concedes respondents have met the first tests required by the FOIA under subsection (a) thereof.

Respondents, in the Statement of the Case, have set out definitions of excise tax private letter rulings and technical advice memoranda, their contents and the methods of obtaining them. Index-digest cards are also described. The facts as set out were summarized from the Technical part of the I.R.M. Nowhere in the Manual nor in the IRS regulations are any of these records specifically described or referred to as "returns." If the IRS had, prior to this case, considered such records to be returns, it is reasonable to assume it would have so stated in its Manual.

The IRS in its brief contends that the requested excise tax records are specifically exempt from disclosure under Exemption 3 of the FOIA. This exemption requires that the IRS must prove that there is a statute which specifically exempts such records from disclosure. In its "Question Presented" the IRS relies only on Section 6103 of the I.R.C. as authority for refusing disclosure.

Where an agency attempts to bar disclosure under one of the exemptions of the FOIA, "the burden is on the agency [IRS] to sustain its action." See 5 U.S.C. § 552 (a)(4)(B). In view of this statutory requirement, the IRS must prove that the requested

records constitute "returns made" under Section 6103 (a)(2) in order to come under Exemption 3.

The FOIA was amended in 1974 to clarify and expand the disclosure policies formulated by Congress when the Act was originally adopted in 1966. By the 1974 amendments Congress has stated that not only must those records which are not exempt be disclosed but "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt under this subsection" must also be disclosed (5 U.S.C. § 552(b)). These arguments are addressed separately under Argument II of respondents' brief at pp. 59-70.

Respondents do not contend that excise tax returns made and filed with the IRS must be disclosed. Rather they contend, and the lower courts held, that the requested records do not constitute "returns made" under Section 6103 and, therefore, do not come within Exemption 3.

The legislative history of the FOIA indicates that an agency is to disclose records unless they are explicitly allowed to be kept secret by one of the exemptions under subsection (b) therein.

This Court has ruled that the exemption requirements of the FOIA must be construed narrowly. To date this Court has interpreted Exemption 3 in only one opinion, that being *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975).

Unlike the respondents in *Robertson*, the respondents herein do not contend that the FOIA repealed Section 6103 or any other exemption statutes. This Court therein noted that the Civil Aeronautics Board had brought Section 1104 of the Federal Aviation Act

and its agency interpretation thereof to the attention of Congress. It stated that no quesion was raised or challenge made to the agency view that such provision and the agency's interpretation were encompassed within Exemption 3. The situation in the case at bar is to the contrary. When the IRS brought Section 6103 to the attention of the Senate at the Subcommitee Hearings of 1963 and 1965, it expressed its interpretation that this Section did not encompass private letter rulings and technical advice memoranda. No question was raised or challenge made to the IRS view that the impact of Exemption 3 did not apply to such records. The IRS is now attempting to reject its own interpretation of Section 6103 which Congress recognized as not including private letter rulings and technical advice memoranda within Exemption 3. In addition, this Court, in *Robertson,* found that Section 1104 gave the Administrator or Board broad discretion, in nature and scope, to withhold disclosure. Section 6103 is much more narrow and only permits the IRS to withhold "returns made" from disclosure. The records requested by respondents have been held by the lower courts in this case not to constitute "returns made."

Section 6103 specifically refers only to "returns made" and does not refer to or even intimate that the private letter rulings, technical advice memoranda, index-digest cards and other requested records come within the intent of that Section. Therefore, in order to sustain its refusal to disclose the records, the IRS now contends that they constitute "returns" "where such requested records contain information which is either part of or related to returns by particular taxpayers." (See IRS Question Presented, Pet. br. 2). It would appear that the IRS concedes that where the

record is not part of or related to a filed return it must be disclosed. Such would be the case where a taxpayer has requested an excise tax ruling inquiring whether a particular article is subject to the tax. If the IRS by private letter ruling advises that it is exempt, then the article is not taxable and sales thereof are not taken into consideration when computing the tax liabiity appearing on a return. The IRS has offered no evidence as to the contents of the requested records.

The IRS makes the unsupported statement that the history of Section 6103 shows that Congress intended all "tax information" to be nondisclosable. Only a cursory review is made by it of the Congressional history, undoubtedly because there is a dearth of Congressional records covering the subject matter. The words "returns" and "returns made" have been used in the tax statutes from 1870 to the present. Congress has not attempted to broaden the term "returns" beyond its commonly accepted meaning. Rather, it has left it to the courts to interpret the meaning of the term and they have done so narrowly and strictly, not broadly as contended by the IRS.

Prior to page 20 of its brief, the IRS argues for "the confidentiality requirement with respect to tax returns made." (Pet. Br. 18) Commencing at page 20 it broadens its argument to cover the nondisclosure of "tax information" and finally, at page 21, "information furnished by taxpayers to the Treasury." There is no explanation for the progression from "tax returns made" to "tax information" to "information furnished by taxpayers to the Treasury." By such arbitrary progression the IRS attempts to encompass all of the requested records within the term

"return." There is neither Congressional nor judicial authority for this position.

The rulings program of the IRS came into existence approximately 38 years ago. Since it was not in existence when Congress first required the filing of returns, that body could not have intended rulings to be either part of a return or confidential as contended by the IRS.

When it suits its purpose the IRS makes public disclosure of private letter rulings. In *Allstate Insurance Company* v. *United States,* 329 F.2d 346 (C.A. 7, 1964), the IRS introduced such rulings into evidence to prove an unpublished administrative practice of the IRS. If it had then considered these rulings to be "returns" under Section 6103, then it would have been unlawful for the IRS to have made such disclosure. It follows that having made this disclosure it did not consider the rulings to constitute "returns."

Respondents contend Section 7213 of the I.R.C. and its legislative history support their contention that the requested documents do not constitute "returns." That Section prohibits disclosure of certain data set forth in "any income returns." It specifically refers to the nondisclosure of trade secrets and the amounts and sources of income, profits, losses and expenditures. Clearly Congress intended the definition of "returns" to be limited to such data. Nowhere in the statute is reference made to a restriction on disclosure of interpretations of law or final opinions of the IRS.

This Court and the lower courts have maintained a policy of narrowly defining the term "return." The leading case is *Florsheim Bros. Drygoods Co.* v *United States,* 280 U.S. 453, 457 (1930) wherein this Court

adopted the narrow definition of "return," *i.e.,* "information requisite for an assessment of the tax." See also *Commissioner* v. *Lane Wells Co.,* 321 U.S. 219, 223 (1944). The courts have narrowly construed the term when interpreting Sections 6501, 6651 and 7213 of the IRC.

Until 1972, IRS regulations used a narrow definition of the word "return." It was only after the plaintiffs in *Tax Analysts & Advocates* v. *Internal Revenue Service,* 362 F. Supp. 1298 (D.D.C., 1973) filed a formal request for private letter rulings and technical advice memoranda in 1972 that the broad definition of the term was promulgated. Prior to 1961, the IRS confined its definition to records "designed to be supplemental to or to become a part of income returns." In that year, amended Treasury Regulations deleted the reference to "income." A comparison of its 1961 and 1972 regulations defining "returns" shows how far afield the IRS has gone in order to avoid disclosure of the records sought herein and to circumvent the clear intent of Congress under the FOIA.

The 1972 regulations of the IRS defining the term "returns" are not applicable inasmuch as they exceed statutory bounds. Pursuant to Section 6103, regulating the public disclosure of returns, the IRS has promulgated a regulation which it now contends prohibits disclosure of its interpretation of law. This Court has held that the IRS does not have the power to make law, for no such power can be delegated by Congress. It may only adopt regulations to carry into effect the will of Congress, and if they are unreasonable and plainly inconsistent with the statute, they cannot stand.

Former Assistant Commissioner (Technical) Harold T. Swartz, in a deposition in the *Allstate* case, testified

that private letter rulings establish precedent, are circulated to field offices and are always followed unless some consideration causes a change in position. A number of private letter rulings were offered into evidence by the IRS in that case to establish an unpublished administrative practice concerning consolidated tax returns.

Mr. G. d'Andelot Belin, the then General Counsel of the Treasury Department in testifying in 1963 before a subcommittee of the Senate Committee on the Judiciary pertaining to the FOIA, stated: ". . . we wish to repeat that the Treasury Department is not opposed to publicity for its rulings and decisions."

Disclosure of the requested records is necessary to avoid disparity in the treatment of taxpayers. There are relatively few cases interpreting manufacturers excise tax law since those subject to it are permitted to pass this tax on to the purchaser. Consequently, it is important to know prior to sale whether an article is taxable. Such knowledge is generally obtained through private letter rulings issued by the IRS. As a result one manufacturer may gain a competitive advantage over another by obtaining such a ruling and not disclosing its contents to competitors. Such rulings constitute final opinions and interpretations of the IRS and are subject to disclosure under the FOIA.

Even if the requested documents constitute "returns" within the meaning of Section 6103, nevertheless the 1974 amendments of Sections 552(a)(4)(B) and 552(b) of the FOIA require reasonably segregable portions of the records requested to be submitted to the court for in camera review. This Court, in *Environmental Protection Agency* v. *Mink,* 410 U.S. 73 (1973),

invited Congress to clarify its intention as to whether the Act should be interpreted more broadly. After extensive Congressional hearings, during which the *Mink* case was repeatedly referred to, Congress not only revised Exemptions 1 and 7 but added a sentence at the end of subsection 552(b) which it specifically said was to apply to "all exemptions." The amendment to subsection 552(b) stated:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

To date there are no reported cases interpreting this language; therefore, we must look to the Congressional hearings if further clarification is required. In the Senate debates it was clearly stated that courts may order disclosure of portions of files or records as well as entire files or records. The American Bar Association appeared during the hearings and advocated that agencies be permitted to separate exempt from non-exempt information in a particular record and make available the non-exempt information. The present Attorney General in a published 1974 Memorandum stated that the FOIA as amended required such a separation and disclosure of the non-exempt portion.

The 1974 amendments also broadened the in camera inspection and de novo review procedures and stated that they should be available under all exemptions.

Finally, it should be noted that IRS representatives appeared before these Congressional committees and urged that the Act not be broadened inasmuch as there would be made available to the public thousands of unpublished letter rulings which would place an ex-

pensive burden on the agency to delete names, addresses and identifying details. In spite of such statements Congress passed the broadening amendments. Clearly, it was the intent of Congress that the records sought by respondents be made available to the public in order to avoid the secret body of law principle so long advocated by the IRS. The order from which the IRS is appealing includes a provision for in camera inspection and the deletion of any matter found to be exempt under the FOIA.

ARGUMENT

INTRODUCTION

At the outset, it is important to note that 5 U.S.C. § 552 was amended in 1974 by Pub. L. 93-502, 93d Cong., 2d Sess., 88 Stat. 1561. This Court, in *NLRB* v. *Sears, Roebuck & Co.* stated, "any decision of the Exemption 7 issue in this case would have to be under the Act, as amended, *Fusari* v. *Steinberg,* 419 U.S. 379, 387 (1975). . . ." 421 U.S. 132, 165 (1975). See also *Administrator, FAA* v. *Robertson,* 422 U.S. 255 (1975), n. 2. In view of the foregoing, this brief is written with reference to the FOIA presently in effect.

The background of the FOIA and its principal objectives are set forth fully in *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 79-80 (1973), *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 12-13 (1974), and reaffirmed in *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. at 136, and will only briefly be referred to herein.

It is the position of the IRS that certain records generated by it, such as excise tax private letter rul-

ings, technical advice memoranda, index-digest cards, and certain files, correspondence and communications pertaining to excise tax, are specifically exempt from disclosure by statute pursuant to Exemption 3, viz-Section 6103 of the I.R.C. and constitute "returns made with respect to" certain taxes provided therein. Respondents contend that such records are not specifically exempt by statute inasmuch as they do not constitute a "return" or any part thereof and that the IRS by amending its Regulations cannot adopt a definition of the word "return" not intended by Congress. Respondents further contend that even if any part of the requested records are part of or supplemental to an excise tax return, any reasonably segregable portion should be provided to respondents after deletion of the exempt portions provided by the 1974 amendment to Subsection (b) of the FOIA.

A. The Clear Mandate of the Freedom of Information Act Requires Disclosure in the Present Case

The primary purpose of the FOIA is to increase the citizen's access to governmental records. *Environmental Protection Agency* v. *Mink,* 410 U.S. 73 (1973); *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1 (1974); *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132 (1975); and *Administrator, FAA* v. *Robertson,* 422 U.S. 255 (1975).

The legislative history of the FOIA clearly establishes that Congress recognized that the purpose of the Act was to establish a general philosophy of *full agency disclosures unless the information is exempted under clearly delineated statutory language.* See Senate Report No. 813, October 4, 1965, to accompany

Senate Bill 1160 (the FOIA) for a general discussion of the need to avoid secrecy by governmental agencies. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

In 1972 the House Committee on Government Operations stated:

> When Congress passed the Freedom of Information Act, it issued a rule of government that all information with some valid exceptions was to be made available to the American people—no questions asked. The exceptions—intended to safeguard vital defense and state secrets, personal privacy, trade secrets and the like—were only permissive, not mandatory. When in doubt, the department or agency was supposed to lean toward disclosure, not withholding. H.R. Rep. 1419, 92d Cong., 2d Sess. 14 (1972).

B. Exicse Tax Private Letter Rulings and Technical Advice Memoranda Constitute Final Opinions as Well as Statements of Policy and Interpretations of Law Which Have Been Adopted by the Agency Within the Meaning of 5 U.S.C. § 552(a)(2)(A) and (B).

As this Court has clearly stated in *NLRB* v. *Sears, Roebuck & Co.*:

> Certain documents described in 5 U.S.C. § 552(a)(1) such as "rules of procedure" must be published in the Federal Register; others, including "final opinions . . . . made in the adjudication of cases," "statements of policy and interpretations which have been adopted by the agency," and "instructions to staff that affect a member of the public," described in 5 U.S.C. § 552(a)(2), must be indexed and made available to a member of the public on demand. H.R. Rep. No. 1497, 89th Cong., 2d Sess., 8 (1966) . . . . Finally, and more comprehensively, all "identifiable records" must be made available to a member of the public on demand. 5 U.S.C. § 552(a)(3). 421 U.S. 132, 136-137 (1975) (Footnotes omitted.)

The IRS did not argue in its petition for writ of certiorari or in the brief which it has submitted to the Court that private letter rulings and technical advice memoranda do not constitute final opinions as well as statements of policy and interpretations of law which have been adopted by the IRS and not published in the Federal Register. The IRS admits that private letter rulings and technical advice memoranda constitute its interpretations and legal conclusions of the tax law. (Pet. Br. 7, 12; Appendix, *infra,* 82-84). See *Statement of Procedural Rules,* Internal Revenue Service (26 C.F.R.), §§ 601.201(a)(2), 601.105(b)(5); I.R.M., pts. (11)613.1, (11)713. It must, therefore, be presumed that the IRS has conceded this point.

C. Files Including Correspondence, Analysis and Submissions of Fact Applicable to the Issuance of Certain Published Excise Tax Revenue Rulings, Certain Communications with Respect to Excise Tax Private Letter Rulings as well as Certain Excise Tax Index-Digest Cards Constitute Reasonably Described Records Within the Meaning of 5 U.S.C. § 552(a)(3).

Prior to the amendment of the FOIA in 1974, Section 522(a)(3) provided that agencies were to make available "identifiable records." In 1974 this subsection was amended to provide that the agencies would make them available ". . . upon any request for records which reasonably describes such records. . . ." See Pub. L. 93-502, § 1(b)(1). The Senate Report on this amendment states:

This change again reflects the intent of the original drafters of the FOIA, for in explaining the term "identifiable," the 1965 Senate Report on the Act said:

> The records must be identifiable by the person requesting them, i.e., a reasonable description enabling the Government employee to locate the requested records (*1966 Senate Rept.* at 8.)

. . . Agencies should continue to keep in mind, as specified in *A. G. Memorandum* (p. 24), that "their superior knowledge of the contents of their files should be used to further the philosophy of the act by facilitating, rather than hindering the handling of requests for records." S. Rep. No. 93-854, 93d Cong., 2d Sess. 9, 10 (1974)

The Report then states that the amendments to this subsection "make explicit the liberal standard for identification that Congress intended. . . ." S. Rep. No. 93-854 at 10.

As in the case of private letter rulings and technical advice memoranda, the IRS has not argued that these requested records referred to in this subheading do not constitute reasonably described records within the meaning of 5 U.S.C. §552(a)(3). It must, therefore, be presumed that the IRS has also conceded this point.

I

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT EXCISE TAX PRIVATE LETTER RULINGS, TECHNICAL ADVICE MEMORANDA, INDEX-DIGEST CARDS AND CERTAIN FILES, CORRESPONDENCE AND COMMUNICATIONS DO NOT CONSTITUTE TAX "RETURNS MADE" UNDER SECTION 6103(a)(2) OF THE INTERNAL REVENUE CODE AND, THEREFORE, ARE NOT MATTERS SPECIFICALLY EXEMPT UNDER 5 U.S.C. § 552(b)(3).

A. Legislative History Requires FOIA Exemptions To Be Construed Narrowly

The IRS claims that Exemption 3 prohibits disclosure of the requested records as "specifically exempted from disclosure by statute." This exemption, like all of the exemptions, is expressly limited by subsection (c), which provides:

> This section does not authorize withholding of information or limit the availability of records to the public except as *specifically* stated in this section . . . . (Emphasis added.)

Senate Report No. 813 at page 10, states:

> The purpose of this subsection (f) is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (e).[3] S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965) (Emphasis added.)

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), is almost identical. The courts considering FOIA cases

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[3] Subsections (e) and (f) of S. 1160 (the FOIA) became §§ 552 (b) and (c) of the FOIA.

have generally followed the interpretation of the Act propounded by the Senate Report No. 813.

Justice Stewart, in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973), invited Congress to clarify Section 552(b) of the FOIA, and such fact was noted by various Congressional committees in 1974. Congress did clarify its intentions by adding a new sentence at the end of subsection (b) providing that:

> Any reasonably segregable portion of a record after deletion of the portions which are exempt under this subsection. Pub. L. 93-502, § 2(c) (November 21, 1974).

The legislative history of this new sentence is discussed in detail, commencing at page 59, *infra*. Thus, in 1974, Congress again reaffirmed its position that the exemptions were to be construed narrowly so as to limit the agencies' right to refuse disclosure of requested records.

B. Judicial Construction of Exemption 3

This Court stated in *Environmental Protection Agency* v. *Mink*:

> "The policy of the Act requires that the . . . exemptions [be construed narrowly]." *Soucie* v. *David*, 145 U.S. App. D.C. 144, 157, 448 F.2d 1067, 1080 (1971). "A broad construction of the exemptions would be contrary to the express language of the Act." *Wellford* v. *Hardin*, 444 F.2d 21, 25 (C.A. 4, 1971). 410 U.S. at 96, n. 2.

See also H. R. Rep. No. 1419, 92d Cong., 2d Sess. 77 (1972).

The only opinion issued to date by this Court pertaining to the interpretation of Exemption 3 is *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975). In that case the FAA claimed that Exemption 3 applied to the requested information since Section 1104 of the Federal Aviation Act specifically permitted the Administrator to withhold information public disclosure of which, in his judgment, would adversely affect the interest of the objecting party and was not required to be disclosed in the interest of the public. In discussing the FOIA, this Court noted:

> The Act has two aspects. In one, it seeks to open public records to greater public access; in the other, it seeks to preserve the confidentiality undeniably essential in certain areas of Government operations "if at all possible, are to be given effect." 422 U.S. 255, 261 (Citations omitted.)

The Court further said:

> The language of Exemption 3 contains no "built-in" standard as in the case of some of the other exemptions. 422 U.S. at 262.

Respondents agree that the FOIA is not to be read "as repealing by implication all existing statutes 'which restrict public access to specific Government records.'" 422 U.S. 255, 265. It is the position of respondents that the records requested from the IRS are not specifically exempted from disclosure by statute.

This Court in *Robertson* held that the following language of the Federal Aviation Act gave the Administrator the power to withhold information from public view:

> . . . the Board or Administrator shall order such information withheld from public disclosure when,

in their judgment, a disclosure of such information would adversely affect the interests of such persons and is not required in the interest of the public. 422 U.S. 255, 258, n. 4 (Emphasis added.)

Inasmuch as the Administrator was specifically given this broad power, such information was exempt by statute, and Exemption 3 was held to apply.

The case at bar differs from *Administrator, FAA* v. *Robertson,* in that no broad discretionary power to withhold records from public disclosure has been given to the IRS under Section 6103.

C. Section 6103 of the Internal Revenue Code Does Not Bar Disclosure of Excise Tax Private Letter Rulings, Technical Advice Memoranda, Index-Digest Cards and Related Records.

1. Introduction

Exemption 3 of the FOIA permits the nondisclosure of any matters which are specifically exempt by statute. The IRS argues that Section 6103 is such a statute and bars disclosure of the excise tax records requested by respondents. Throughout its brief, it asserts again and again that for purposes of Section 6103 any written or oral statement that is related to anything contained in a tax return or to the computation of tax liability is a "tax return." It is as though by repeatedly making the assertion it becomes a fact. It is not a fact, rather it is the issue in this case.

The requested records relate only to the manufacturers excise tax imposed by Chapter 32 of the I.R.C. Therefore, only Section 6103(a)(2) is involved, since it alone governs returns made with respect to taxes imposed by Chapter 32. Form 720 must be used for reporting the manufacturers excise tax, as well as certain other excise taxes, on a quarterly basis. Treas. Reg. § 48.6011(a)-1(a), T.D. 6915, 1967-1 Cum. Bull. 322, 330. As to this tax the only information reported is the dollar amount of the tax liability and the amount of credits to which the taxpayer is entitled for adjustments and previously paid deposits. These credits are subtracted from the stated excise tax liability on taxable articles to produce the tax due. Neither gross sales, taxable sales nor any other confidential information is required. An excise tax return is really nothing more than a form used to transmit the manufacturer's tax payment or notify the IRS that the total credits exceed his quarterly excise tax liability. The IRS has carefully avoided making reference to the fact that this case involves only a request for manufacturers excise tax records. Any definition of "tax return" under Section 6103 must be in relation to the reporting and computation of manufacturers excise tax iability.

The records requested by respondents (A. 9-14) are principally related to determinations of whether articles are taxable under Section 4061 of the I.R.C. and the methods, means and formulae for determining the applicable constructive sales price under Section 4216 (b) upon which the excise tax is computed.

The IRS states that Section 6103 imposes "confidentiality with respect to tax returns" (Pet. Br. 19). It also states that this nondisclosure rule is similar to that generally provided by 18 U.S.C. § 1905 forbidding government employees "to disclose financial or commercial information received in the course of employment." It further asserts that Section 7213 "makes it a misdemeanor for various specified persons to divulge data set forth in an income tax return." Respondents submit that the three laws cited by the

IR ' are narrow in scope. Section 6103 refers only to "returns." Section 1905 refers to "financial or commercial information." Section 7213 refers only to data "set forth or disclosed in any *income return*" and does not apply to excise tax returns (Emphasis added.); *United States* v. *Olster,* 15 F. Supp. 623 (D.C. Pa., 1936).

For three pages (Pet. Br. 18-20) the IRS glosses over the history of the confidentiality of "tax returns," then substitutes the broader term "tax information" (Pet. Br. 20) for "tax returns" and finally substitutes "information furnished by taxpayers to the Treasury" (Pet. Br. 21). Thus by such arbitrary progression the IRS seeks to equate "tax returns" with any "information furnished by taxpayers to the Treasury," whether or not it has anything to do with the computation or assessment of tax. The IRS then continually asserts throughout its brief that "information furnished by taxpayers to the Treasury" is exempt from disclosure.

Respondents do not contend nor did the court of appeals hold that privileged and confidential information is limited to that contained on printed tax forms (Pet. Br. 16). It is only data necessary for the computation of the tax which a taxpayer is required by law to submit to the IRS that is privileged or confidential. Section 6011 requires that "any person made liable for any tax . . . shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations." Nowhere in Section 6103(a) is the

term "information" used but only the phrase "returns made."

In *Florsheim Brothers Drygoods Co.* v. *United States,* this Court clearly set the standards of what constitutes a "tax return":

> Statutes imposing direct taxes have always required taxpayers to file "lists" or "schedules" or "statements" or "returns" specifying in detail the information requisite for an assessment of the tax. The word "return" has not always been used. Sometimes it has been used as a synonym for "list," "schedule" or "statement." The specification *in the statutes* of the prescribed contents of such lists or returns has varied in its detail. But always definite statements of facts were required, from which the tax could be computed. (Emphasis added.) 280 U.S. 453, 457, n. 3 (1930)

The essence of a tax return is the financial data required by the IRS to be furnished for the computation and assessment of tax. This Court further stated in *Florsheim:*

> The burden of supplying by the return the information on which assessments were to be based was thus imposed upon the taxpayer . . . Form 1120 provided for furnishing the data which would enable the Commissioner to make a determination, assessment and recomputation. 280 U.S. 453, 460.

The IRS continually reiterates in its brief that excise tax private letter rulings "set forth detailed statements of fact." It attempts to use the word "deailed" in the sense that a taxpayer's financial data is extensively set out. This is not the fact. A private excise tax letter ruling usually involves a

single legal issue based upon a very limited factual statement. In the Appendix, *infra,* 86-93, respondents have republished several excise tax private letter rulings which were furnished during the course of proceedings below (Transcript of Jan. 28, 1974, page 3) and most of which were in the Appendix to the respondents' brief in the court of appeals. Each ruling contains a concise statement of facts and then states the "position" or "opinion" of the IRS. The legal interpretations in these rulings are not contained in the IRS regulations. The only way other taxpayers could know of these interpretations of law would be by having access to these rulings, something the IRS has resisted to date.

The IRS further claims that "a letter ruling is essentially an advance audit procedure . . ." (Pet. Br. 12). This is also not a fact. Unlike an income tax return, an excise tax return does not require inclusion of facts upon which the tax is based or computed. Where favorable rulings have been issued holding that an article is not subject to the tax, the subject matter of the ruling would not even be reflected in the tax liability shown on the return if any excise tax return be required. An excise tax audit on the other hand constitutes a detailed check of underlying transactions not required to be reported on an excise tax return. It requires going beyond the return and examining the taxpayer's business, books and records in order to verify the base on which the tax is computed. Clearly an excise tax audit is not the same as a private letter ruling.

During the Senate hearings on the FOIA in 1963, Mr. Belin, then General Counsel of the Treasury Department, testified:

> It should be remembered that although income tax returns may be specifically exempt from disclosure by statute, information about an individual's income derived from audits or other sources is not similarly specifically protected. *Hearings on S. 1666 and S. 1663 (in part) before the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 88th Cong., 1st Sess. 174 (1963).

It should be noted that the three affidavits submitted at trial by the IRS and quoted at pages 7 and 8 of its brief do not discuss the interpretation of "return" with which we are here concerned, but rather relate only to the question of whether the requested records are final opinions or interpretations of the agency under Section 552(a)(2)(A) and (B) of the FOIA, which has been conceded by the IRS.

In the present case there is no statute which specifically states that excise tax private letter rulings, technical advice memoranda, index-digest cards or certain underlying files and correspondence cannot be disclosed under the FOIA. In order to justify non-disclosure, the IRS argues that Section 6103 of the I.R.C., which declares certain tax returns to be public records subject to inspection pursuant to regulations promulgated by the President, bars disclosure of the requested records. Obviously, the only way Section 6103 could apply to the requested records is if they are included within the definition of "returns." Therefore, an examination of legislative history and judicial construction of applicable law is required to determine the scope of the definition of "return."

2. The History of Section 6103, When Read in Conjunction With Section 7213, Establishes That "Returns" Only Include Such Data as Is Necessary to Compute the Tax Shown on the Return.

a. History of Section 6103.

The IRS rulings program as presently constituted is approximately 38 years old. Caplin,[4] *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles,* 20 N.Y.U. Inst. on Fed. Tax. 1, 2 (1962). Congress did not see fit to amend either Sections 6103 or 7213 when this rulings program came into being nor did the IRS request any change. In the past, the IRS has made public use of and relied on private letter rulings by introducing them into evidence in *Allstate Insurance Co.* v. *United States,* 329 F.2d 346 (C.A. 7th, 1964). This further indicates that the IRS itself did not consider them to be "returns," "financial or commercial information," or data "set forth or disclosed in an income return."

The IRS (Pet. Br. 18) refers to the legislative history of Section 6103. Other than merely stating that the early law dealt with "confidentiality requirements with respect to tax returns" the IRS makes no detailed analysis of the early laws. Respondents have searched, as apparently did the IRS, and can find no legislative history which sheds light on the meaning of "returns" other than the language contained in the various Revenue Acts themselves. All such Acts use only the terms "return" or "returns made". It is obvious that if the rulings program, as presently constituted, has been in existence for only thirty-eight years, Congress could not, between 1870

[4] At the time of the publication of this article, Mortimer M. Caplin was Commissioner of Internal Revenue.

and 1938, have passed upon whether a private letter ruling constitutes a "return." It has been the courts which have defined the meaning of "returns" as used in the I.R.C.

b. History of Section 7213.

It must be pointed out that Section 6103 is not the only section of the I.R.C. dealing with non-disclosure. Section 7213 provides that an officer or employee of the United States may not disclose ". . . the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return" and certain trade secrets. (Appendix, *infra,* 76-77)

In this Section Congress has set forth categories of financial data which cannot be disclosed. When Section 6103 is read in conjunction with Section 7213, the purpose of these non-disclosure provisions is clearly to protect the interests of persons compelled under the revenue laws to file tax returns. *Boske* v. *Comingore,* 177 U.S. 459, 470 (1900). Respondents have not requested financial data which taxpayers are required to report on their excise tax returns but merely seek interpretations of law contained in records generated, maintained and relied on by the IRS.

A review of the history of Section 7213 reinforces the conclusion that the only types of records which Congress intended to protect from disclosure by this Section were income returns under Section 6103, trade secrets and financial data necessary to compute the tax due.

The Act of June 30, 1864, ch. 173, § 38, 13 Stat. 223, 225, 258 (the forerunner to Section 7213), pertaining to disclosure of information, provided that

no internal revenue employees shall make known ". . . in any other manner than may be provided by law, the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties. . . ." It is apparent that this statute contained no definition of "return," but only the admonition not to disclose "the operations, style of work, or apparatus of any manufacturer . . . ." Such information could constitute trade secrets of the taxpayer and could be exempt from disclosure under Exemption 4 of the FOIA.

In 1894, the Fifty-third Congress included in the then newly enacted Income Tax Act (subsequently declared unconstitutional) additional provisions relating solely to income returns. It provided in part that no employee of the United States shall

> make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amounts or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return by any person or corporation . . . Act of August 27, 1894, ch. 349, § 34, 28 Stat. 509, 557.

c. Conclusion.

The legislative history discussed in the foregoing pages makes it clear that Congress did not intend the word "returns" as used in Section 6103 to include every piece of paper in the files of the IRS but rather intended to restrict nondisclosure only to that report containing "the information requisite for an assessment of the tax." *Florsheim Brothers Drygoods Co.* v. *United States,* 280 U.S. 453, 457, n. 3. Excise tax private

letter rulings, technical advice memoranda and other requested records do not contain information necessary for the assessment of tax and, therefore, do not constitute "returns made" as stated in Section 6103. This being the case, there is no statute specifically exempting the requested records from disclosure.

3. Judicial Construction of the Term "Returns" as Used in Other Sections of the Internal Revenue Code Establishes THAT Private Letter Rulings, Technical Advice Memoranda and Related Documents Are Not "Returns" Within the Meaning of the Code.

a. Introduction.

The term "returns" is used extensively throughout the I.R.C. While neither Section 6103 nor any other part of the Code contains a definition of the term, many courts have been called upon to construe the term in connection with such other Code sections. In other cases the IRS has argued in favor of a narrow interpretation of "return", and uniformly the Court definitions have been restrictive.

b. Statute of Limitations, Section 6501.

The statute of limitations barring the assessment or collection of taxes begins to run with the filing of a "return." I.R.C., § 6501. For purposes of the statute of limitations, an income tax return is a statement under oath (if required) of the specific items of a taxpayer's income, deductions and credits which is necessary to enable the Commissioner to compute and assess the tax. *Florsheim Brothers Drygoods Co.* v. *United States,* 280 U.S. 453, 460 (1930); *John H. Houston,* 38 T.C. 486, 491 (1962); *Stevens Brothers Foundation, Inc.,* 39 T.C. 93, 105 (1962), *aff'd* in part and *rev'd* in part, 324 F.2d 633 (C.A. 8th, 1963).

This Court has recognized that a "return" must disclose income and deductions "with such uniformity, completeness and arrangement that the physical task of handling and verifying returns may be readily accomplished." *Commissioner* v. *Lane-Wells Co.,* 321 U.S. 219, 223 (1944).

It has been held that a "return" filed by a successor corporation which grouped the income and losses of the old and new corporation without segregation was not sufficient. *Cem Securities Corp.* v. *Commissioner,* 72 F.2d 295, 298 (C.A. 4th), *cert. denied,* 293 U.S. 613 (1934).

The IRS argues at page 37, n. 19 of its brief that a W-2 form is "deemed a return." The IRS has taken both sides of the question of whether even a W-2 form is part of a return. In *United States* v. *Accardo,* 298 F.2d 133 (C.A. 7th, 1962), the government introduced Forms 1040 as income tax returns, after detaching the W-2 forms therefrom.

A tentative excess profits tax return showing the taxpayer's name, address and amount of estimated tax due was held not to be a return because the items of income, deductions and credits were not stated. *Southern Sportswear Co.* v. *Commissioner,* 10 T.C. 402, 404, 405 (1948), *vacated on other grounds,* 175 F.2d 779 (C.A. 6th, 1949).

c. Penalty, Section 6651.

The I.R.C. also provides for a penalty not exceeding 25% of the aggregate of the tax due for failure to file an income tax "return" on the date prescribed. I.R.C. § 6651(a). A return sufficient to preclude the imposition of the 25% penalty is a report giving substantial in-

formation as to the specific items of the taxpayer's gross income and the deductions and credits to which he is entitled. *Commissioner* v. *Lane-Wells Co.,* 321 U.S. 219 (1944).

Similarly, in *National Contracting Co.,* 37 B.T.A. 689, *aff'd,* 105 F.2d 488 (C.A. 8th, 1939) a blank return containing a rider stating the return was submitted pending the outcome of tax questions for other years was not an income tax return. See also *Harrington Co.,* 6 T.C. 720 (1946).

It has been held that Form 1040 filed within the allotted time does not qualify as an income tax "return" where it does not state specifically the items of gross income and the deductions and credits allowed. *Leo Sanders,* 21 T.C. 1012 (1954), *aff'd,* 225 F.2d 629 (C.A. 10th, 1957).

d. Failure to File a Return, Section 7203.

The wilful failure to file a "return" constitutes a misdemeanor under the I.R.C. Here, as with the other Code provisions, the essence of the term "return" is a report to the IRS which contains information required to be included on the form used for the determination of tax liability, such as the taxpayer's income, credits and deductions. *United States* v. *Porth,* 426 F.2d 519, (C.A. 10th) *cert. denied,* 400 U.S. 824 (1970). In *Porth,* it was held the filing of a form with only the taxpayer's name and reference to various constitutional provisions which he asserted excused him from filing was not a return within the meaning of Section 7203. 426 F.2d at 523.

Similarly, a blank Form 1040 has been held not to constitute an income tax "return" within the meaning

of Section 7213. *United States* v. *Radue*, 486 F.2d 220 (C.A. 5th), *cert. denied*, 416 U.S. 908 (1973).

As can be seen from the above discussion, the term "return" has consistently been held to be a report by a taxpayer to the IRS containing required financial data from which a tax can be computed. Excise tax returns need only include the tax liability and credits with no such financial data being required.

D. Analysis of IRS Regulations Under Section 6103.

None of the prior regulations of the IRS included a definition of the term "return" which was as broad and sweeping as its definition included in the present regulations. Treas. Reg. § 301.6103(a)-1(a)(3(i), T.D. 7162, 1972-1 Cum. Bull. 382.

The following definition of "returns" appeared in the 1938, 1941 and 1953 regulations:

> For the purposes of this article the word "returns" shall include information returns, schedules, lists, and other written statements filed with the Commissioner designed to be supplemental to or to become a part of *income* returns. Treas. Reg. Art. 55(b)-5 (1938); Treas. Reg. § 29.55(b)(1) (1941); Treas. Reg. § 39.55-1 (1953); (Emphasis added; Appendix, *infra*, 77-78).

In 1961, the IRS issued a Treasury Regulation which deleted reference to "income" returns. Treas. Reg. § 301.6103(a)-1, T.D. 6543, 1961-1 Cum. Bull. 671, 673.

A comparison of the 1961 and 1972 definitions promulgated by the IRS shows the expansive language of the 1972 regulation:

1961	*1972*
(3) *Terms used*—(i) *Return.* For purposes of Section 6103(a), the term "return" includes—	(3) *Terms used*—(i) *Return.* For purposes of Section 6103(a), the term "return" includes—
Information returns, schedules, lists, and other written statements filed with the Internal Revenue Service which are designed to be supplemental to or to become a part of the return, and, in the discretion of the Secretary or the Commissioner or the delegate of either, other records or reports containing information included or required by statute to be included in the return....	(a) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and (b) Other records, reports information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken or any portion thereof, relating to the items included under (a) of this subdivision.

As can be seen, the IRS has not considered the term "return" to include all "information furnished by taxpayers to the Treasury" as now contended by the IRS. Only those lists, schedules and written statements which were "designed to be supplemental to or to become part of a return" were previously included. It should be pointed out that on February 7, 1972, the plaintiffs in *Tax Analysts & Advocates* v. *Internal Revenue Service*, 362 F. Supp. 1298 (D.D.C., 1973), filed their formal request for private revenue rulings and technical advice memoranda (involving *income* tax matters) with the IRS. Nine days later, February 16, 1972, by Treasury Decision 7162, the new definition of "return" was issued. The regulation, in which the new definition of "return" was included, was issued *with-*

out prior notice or hearing. Treas. Reg. § 301.6103(a)-1, T.D. 7162, 1972-1 Cum. Bull. 382.

The IRS contends that Congress' several reenactments of Section 6103 while the earlier, and much less sweeping, regulations were in force shows that Congress understood and approved its present broad definition; and that likewise, the FOIA must be construed to comprehend the same broad definition. *The simple answer is that the broad language dates only from February 6, 1972, and Congress has not reenacted Section 6103 since that date.* The regulation in effect before that date provided that "return" included only such "records or reports containing information *included or required by statute to be included in the return.*" The date of the regulation not only deprives it of the benefit of "reenactment"—it makes it suspect as possibly written with FOIA litigation in mind, since the enactment by Congress of the FOIA clearly undercuts any antiquated agency decisions tending to support nondisclosure.

Treasury Decision 7162, which announced the amendment of Regulation § 301.6103, declared that it was designed "to clarify the definition of the term 'return' under Section 6103 of the Internal Revenue Code of 1954. . . ." If it was unclear, it can hardly be deemed approved by enactment of the FOIA in 1966.[5]

E. The New Regulations of the IRS Are Inapplicable Since They Exceed Statutory Bounds.

The IRS has attempted by regulation to establish a definition of "return" broad enough to include all of the requested excise tax records.

[5] Moreover, the regulation is invalid because it was issued without proper notice as required by 5 U.S.C. § 553(b).

It includes any oral or written information, in whatever form, "relating to" anything which, in turn, is "designed to be supplemental to or become part of a return." Treas. Reg. § 301.6103(a)-1(a)(3), T.D. 7162, 1972-1 Cum. Bull. 382. It far exceeds the intent of Section 6103 and is an attempt by the IRS to amend the statute administratively to suit its own purposes and to come within the ambit of Exemption 3. The regulation as so construed is unlawful and clearly violates the intent of the FOIA.

The general rule that the scope of a regulation, including a Treasury regulation, cannot exceed the bounds of the statute has been recognized by this Court from an early date. *United States* v. *Two Hundred Barrels of Whiskey,* 95 U.S. 571 (1877); *Campbell* v. *Galeno Chemical Co.,* 281 U.S. 599, 610 (1930); *International Railway* v. *Davidson,* 257 U.S. 506, 514 (1922); *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129 (1936). See *Helvering* v. *Sabine Transportation Co.,* wherein, when holding a Treasury regulation invalid, the Court stated:

> We think the regulations are in the teeth of the unambiguous mandate of the statute, are contradictory of its plain terms, and amount to an attempt to legislate. They cannot prevail to preclude the credit claimed. 318 U.S. 306, 311-12 (1943) (Footnote omitted).

In summary, "where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation." *Koshland* v. *Helvering,* 298 U.S. 441, 447 (1936), (Footnote omitted.)

F. Petitioner Has Voluntarily Made Public Records Similar To Those Requested in This Case.

In *Allstate Insurance Co.* v. *United States,* 329 F.2d 346 (C.A. 7th, 1964), Allstate brought a refund suit to recover over $3,400,000 in Korean War excess profits taxes paid for the years 1950, 1952 and 1953. The formula under which Allstate had computed its taxes was conditioned upon it not having a privilege of filing a consolidated tax return with its parent corporation, Sears, Roebuck & Co. A literal reading of applicable Treasury regulations prohibited such consolidated filing due to their different accounting periods and the requirement that Allstate, as an insurance company, use a calendar year for income reporting purposes. The IRS contended that there was an unpublished administrative practice existing within the IRS by which Sears and Allstate would have secured a private ruling allowing them to file consolidated returns had they requested it.

To prove the existence of this unpublished administrative practice, the IRS offered at trial the deposition of its Assistant Commissioner (Technical) Harold T. Swartz (Supp. App. 53-181). He was represented by the IRS as

> . . . an individual who is probably more fully acquainted than is any other person in the nation with the facts concerning the administrative practices of the Revenue Service in issuing rulings. (Supp. App. 252.)

Swartz was in charge of all rulings issued to taxpayers as well as answering all requests for technical advice received from field offices (Supp. App. 61). All of the private letter rulings that had been issued in the area of consolidated returns where one of the affiliates was

an insurance company were voluntarily introduced into evidence by the IRS as constituting its administrative practice. (Supp. App. 76-79, 90, 192-234). In its memorandum opinion and order, in *Allstate*, July 31, 1962 (Supp. App. 15), the district court held:

> [I]t is determined that the Swartz deposition and the letter rulings do tend to establish the proposition which they are offered to prove, namely the existence of an unpublished administrative practice. . . . The court thus concludes that the Swartz deposition and the letter rulings are both relevant and competent. Accordingly, Allstate's objections to the admission of the Swartz deposition and the letter rulings into evidence are overruled.

In order to establish this administrative practice, Swartz testified at length as to the actual practice followed by the IRS in issuing and using private letter rulings, technical advice memoranda and index-digest cards. To enable field offices of the IRS to obtain the reasoning behind private letter rulings issued by the National Office, they are distributed to them with a copy of the index-digest card attached. The rulings sent to the field are used for the same purpose as those in the National Office, as setting forth the precedents and positions of the IRS (Supp. App. 92-94, 122-123, 186-187). Private letter rulings circulated to the field contain the names of the taxpayers and are called "confidential unpublished rulings" or CUR's (Supp. App. 123). These are confidential to the extent that the name of the taxpayer is not to be cited when relying on the ruling (Supp. App. 124). The provision in the Internal Revenue Bulletin that unpublished rulings are not to be cited or relied upon by employees of the IRS as precedent in the disposition of other cases is limited to preservation of the identity of the taxpayer. They

are used in disposing of issues coming before agents in the field but are not cited or quoted (Supp. App. 124-125). The fact that one taxpayer cannot rely upon a private letter ruling issued to another does not mean that such ruling has not become a procedure, practice or position of the National Office with respect to similar issues. In fact, it indicates that the same answer would be given to other taxpayers except where the position has been changed (Supp. App. 175). Once a ruling has been placed in the precedent file it is always the administrative practice to follow it unless some consideration causes a change in position (Supp. App. 181).

The IRS, through Swartz, offered seven private letter rulings into evidence as well as requests for rulings, a request for reconsideration of a ruling and a resulting supplemental ruling. These were from both precedent and general files (Supp. App. 66-75). During the course of his deposition, Swartz identified each of the documents contained in these files (Supp. App. 115-165). This led to Allstate filing a motion for inspection and copying of documents described by Swartz in his deposition, including a technical advice memorandum and any files located in the office of the Chief Counsel pertaining to any of the private letter rulings (Supp. App. 12-17). The IRS opposed the motion on grounds of relevance, attorney-client privilege, attorney-work-product and executive privilege but did not raise any privilege based on Sections 6103 or 7213 (Supp. App. 240-244). At a hearing on January 11, 1962, the IRS waived all objections except relevance and read into the record a portion of a technical advice memorandum issued to the District Director in Chicago relating to the Allstate case itself. The court ruled

against the IRS as to relevance, and all requested documents were turned over to Allstate and offered into evidence (Supp. App. 234-239). All of the rulings, requests, General Counsel Memoranda and other documents were turned over by the IRS complete and intact except for partial deletion of names of the taxpayers and their representatives (Supp. App. 192-238).

G. At Congressional Hearings on the FOIA the IRS Admitted That the Requested Records Do Not Constitute "Returns" Under Section 6103.

Prior to the enactment of the FOIA representatives of the IRS testified before the Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary [6] concerning both the scope of Section 6103 and the disclosure of private letter rulings and other records. The then General Counsel of the Treasury Department, Mr. Belin, accompanied by the Commissioner of the IRS, stated that while income tax returns were specifically exempt from disclosure by statute, information about an individual's income derived from audit or other sources is not exempt. He also testified that the Treasury Department was not opposed to making its rulings and decisions public. He said that every citizen should readily be able to secure precedential rulings, orders, interpretations, rulings and adjudications of the IRS. Mr. Belin did not consider that private letter rulings or technical advice memoranda would be exempt from the disclosure pro-

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[6] *Hearings on S. 1666 and S. 1663 (in part) before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 88th Cong., 1st Sess. (1963).

visions under Section 6103 or any other statute.[7] He specifically informed the subcommittee of the burden that would be involved in deleting identifying details

[7] "Many records of the Internal Revenue Service in addition to those which are presently specifically exempt from disclosure by statute, disclose information about our incomes, our business activities, and our transactions with others. It should be remembered that although income tax returns may be specifically exempt from disclosure by statute, information about an individual's income derived from audit or other sources is not similarly specifically protected. Furthermore, existing statutes do not protect information derived from the administration of various other taxes including retailers' excise taxes, taxes on admissions and dues and regulatory taxes such as those on narcotics."

• • • •

"The provisions of the bill with respect to the publication and indexing of material are at least as objectionable as those relating to disclosure of official records. One effect of the bill would be to require the publication and indexing of many millions of decisions, rulings and interpretations which are neither needed nor wanted by the public. We have been unable to calculate the cost of such indexing and publication to the Treasury Department, but it clearly would be very great. *In this connection, we wish to repeat that the Treasury Department is not opposed to publicity for its rulings and decisions. . . .*"

"We have every reason to believe that every citizen having any concern with these matters can readily secure all needed information as to precedential rulings, orders, and interpretations either through the voluminous printed material now available or by direct correspondence with the appropriate bureau or office."

"We reiterate therefore that our concern with the indexing and publication features of the present bill does not stem from any objection to keeping the public properly informed as to the rulings and adjudications of the Department, but we are deeply concerned by the provisions of the bill which would require the publication or indexing or both, of all opinions, orders, rules, statements, and interpretations regardless of their importance to the public. As we have pointed out in our detailed statement, provisions such as those contained in the present bill would require the publication or indexing of literally millions of items every year for no useful purpose." (Emphasis added.) *Id.* at 173, 176

from private letter rulings and technical advice memoranda before making them public.[8]

Mr. Belin specifically referred to the coverage of Sections 6103 and 7213 as they relate to the disclosure of tax information. He testified that Section 6103 did not afford confidentiality to all information that taxpayers are required to submit to the IRS. He stated that Sections 6103 and 7213 "are chiefly limited to tax returns" and provide little protection to tax information derived from audits and inspections conducted by IRS employees.[9]

[8] "There would also be a very heavy burden requiring substantial additional personnel in certain bureaus in the deletion of identifying details found, for example, in taxpayer rulings, of which over 30,000 are issued each year. Not only names but other identifying circumstances would have to be edited, with the incidental result in many cases that the published ruling would be virtually meaningless. The Treasury has tried to make some estimate of the additional requirements of funds for personnel, space, and equipment which this feature of section 3(b) would impose on its many affected bureaus, but can only state at this time that the added cost would be very large indeed."

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". . . A myriad of other rulings or interpretations on similarly clear points would also have to be indexed at considerable expense and for no benefit that this Department can perceive. Informal rulings such as the above illustration are not combined centrally or counted. However, formal taxpayer rulings and requests from field offices for technical advice amount to 35,000 to 37,000 a year." *Id.* at 278-79, 281.

[9] ". . . Section 6103, for example by no means affords confidentiality to all of the information which is required to be submitted by taxpayers. For example, this section does not apply to information in the files of the Internal Revenue Service as a result of the administration of retailers' excise taxes, taxes on admissions and dues, documentary stamp taxes, taxes on wagering or regulatory taxes. Moreover, neither section 6103 nor section 7213 affords full protection to the taxpayer even with regard to income tax information. Both sections are chiefly limited to tax returns. To the extent

The testimony by Mr. Belin, on behalf of the IRS, made Congress fully aware that passage of the FOIA would require the public disclosure of private letter rulings and technical advice memoranda. Despite this fact, the FOIA was enacted without any changes relevant to the disclosure of these records. This precisely reflects Congressional intent as to the scope of Section 6103 that was being incorporated in Exemption 3. On page 14 of its brief, the IRS states:

> Thus, when Congress in Exemption 3 continued the effectiveness of Section 6103, it necessarily intended to include the administrative interpretation of the reach of that section which is reflected by the policy of the Internal Revenue Service.

As has been shown above, "the reach of that section" has never gone beyond tax returns to the records requested in the case at bar. The practice of the IRS is shown by the *Allstate* case, and its policy was set forth by its general counsel, Mr. Belin.[10]

When Congress enacted the FOIA it certainly never intended to sanction what the IRS now calls its long standing administrative interpretation of Section 6103 (Pet. Br. 14). In reviewing the effectiveness of the FOIA and agency compliance in 1972, Congress recognized the flagrant abuses by the IRS and its refusal

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this information is derived, as much information is derived, from audits and inspections by Internal Revenue employees, little protection is afforded to the taxpayer by either of these statutes." *Id.* at 274-75.

[10] For an affirmation of this position see the testimony of Edwin F. Rains, then Asst. General Counsel, U.S. Treasury Department, *Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965).

to comply with the Act. Following are two excerpts of statements concerning IRS abuses of the FOIA:

1. Mr. Phillips (Staff director of the Sub-Committee): . . . I can honestly say, Mr. Chairman, of all of the agencies of Government the IRS has been the most flagrant in violating not only the spirit, but the letter of the Freedom of Information Act. We have many complaints in our files from citizens. In my opinion, the policies of the Internal Revenue Service in Freedom of Information matters has almost become a national scandal.[11]

2. Senator Kennedy: In the course of your hearings which agencies had the best record of making the information available to Congress and the public and which had the poorest?

   Congressman Moorhead:[12] I would start maybe with the poorest. The Department of Agriculture, the Food and Drug Administration, and the Internal Revenue Service were among the worst.

   Senator Kennedy: Are they sort of constant repeaters?

   Congressman Moorhead: Yes, constant repeaters.

   Senator Kennedy: From the trend that you saw of these particular agencies over any given period of time, they were the most reluctant or recalcitrant?

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[11] *Hearings on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pt. 6, 2021 (1972).

[12] Honorable William S. Moorhead, Chairman, Foreign Operations and Government Information Subcomm., House Comm. on Government Operations.

> Congressman Moorhead: I think those were the most reluctant and recalcitrant; there were others, too.[13]

On page 38 of its brief, the IRS quoted one sentence from a House Subcommittee report of findings:

> It should be noted that much tax data is exempt from disclosure by law.

The unquoted portion of the same paragraph is far more revealing as to the Subcommittee's findings. The complete paragraph, including the above quoted portion, reads:

> Testimony by Mr. Donald O. Virdin, Chief, Disclosure Staff, Office of the Assistant Commissioner (Compliance), Internal Revenue Service (IRS) and that of Mrs. Charlotte T. Lloyd, Assistant General Counsel, Treasury Department covered some of the most serious cases of bureaucratic abuses uncovered during the subcommittee's investigation of the administration of the Freedom of Information Act. This subject is also dealt with earlier in this report. It should be noted that much tax data is exempt from disclosure by law. H. R. Rep. No. 93-1419, 92d Cong., 2d Sess. 34 (1974) (Footnote omitted.)

The subject "dealt with earlier in this report" concerns the trials and tribulations of Mr. and Mrs. Long with the IRS, including, among other things, the refusal to furnish them some blank IRS forms.

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[13] *Hearings on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923 and S. 2073 Before the Subcomm. on Intergovernmental Regulations of the Comm. on Government Operations of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., v.1. 188 (1973).

H. Disclosure of the Records Requested Is Necessary To Avoid Disparity in the Treatment of Taxpayers.

In spite of the announced purpose of the IRS to achieve uniform application of the tax law by the use of revenue rulings (Pet. Br. 26), in many cases those who receive a favorable private letter ruling or technical advice memorandum are receiving favored tax treatment from the IRS, resulting in disparity in the application of the tax law. *International Business Machines Corp.* v. *United States,* 343 F.2d 914 (Ct. Cl., 1965), *cert. denied,* 382 U.S. 1028 (1966). In that case, the IRS issued a favorable private letter ruling to a competitor of I.B.M., exempting it from the manufacturers excise tax on computers manufactured by it. When I.B.M. learned of this, it also sought an exemption for similar computers manufactured by it. The IRS issued an unfavorable ruling to I.B.M. and revoked the prior favorable ruling issued to its competitor. As to the competitor, however, revocation of the ruling was made prospective only. The Court of Claims held that I.B.M.'s competitor had been unduly favored in the promulgation of this ruling, and that I.B.M. could recover approximately $11,000,000 of manufacturers excise taxes paid by it. The Court therein stated:

> For all tax rulings, it is important that there be like treatment to those who should be dealt with on the same basis. Automobile Club of Michigan v. Commissioner, supra 353 U.S. at 180, and other cases cited supra at page 9. Parity in the levying of manufacturer's tax is peculiarly essential to free and fair competition. See Exchange Parts Co. v. U.S. supra, 150 Ct. Cl. at 541, 279 F.2d at 253; H. Rept. No. 708, 72d Cong., 1st. Session, pp. 31, 32 (1932). 343 F.2d at 923.

Since the rulings process is not an adversary proceeding, there is at present no way of insuring that both the public and private interests will be fully protected against disparity in the application of the revenue laws. In fact, in some cases actual harm to the public interest can result. For example, this issue of harm to the public interest is clearly illustrated in the case of the so-called "production payment carve-out."[14] In the mid-1960's, hard minerals producers began to use this device and related tax avoidance devices. One such related tax avoidance device was the "A-B-C" transaction popular in the rush to build conglomerates.

In the late 1960's, the IRS developed an unpublished but favorable "position" for taxpayers and issued more than 20 private letter rulings approving such "A-B-C" transactions. Senator Albert Gore exposed and criticized the IRS position in four speeches on the floor of the Senate.[15]

In the Tax Reform Act of 1969, Congress abolished the practice and required the transactions to be treated as loans, which, in substance, they were. I.R.C. § 636.

The requirement that private letter rulings be made public is a *sine qua non* to prevent, or at least expose, similar abuses in the future.

Respondents are not requesting information relating to the excise tax liabiity of a particular taxpayer, but only those records in the files of the I.R.S. concerning the interpretation of the excise tax law. These in-

[14] Joint Comm. on Internal Revenue Taxation, *General Explanation of the Tax Reform Act of 1969*, 92d Cong., 1st Sess. 158-61 (1970).

[15] These speeches were made on June 8 and August 11, 16 and 19, 1966. See 112 Cong. Rec. 12,080-84; 18,146-47; 18,685; 19,166-67 (1966).

terpretations have heretofore been kept secret and are not available to the general public from any other source. There is an infinite difference between disclosing "the law" and disclosing privileged and confidential commercial and financial data contained in a tax return.

Respondents submit that excise tax private letter rulings and technical advice memoranda have long constituted a body of secret law which favor those few taxpayers able to afford the cost of obtaining them. Most of the interpretations are not restated in the regulations or published revenue rulings of the IRS. All taxpayers have a right to the same governmental interpretations of law. As was stated in Senate Report No. 813 at 10, pertaining to the FOIA:

> A government by secrecy benefits no one. It injures the people it seeks to serve, it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty. S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965)

The records requested do not constitute "returns made" within the meaning of Section 6103 and should be disclosed.

II

THE 1974 AMENDMENTS TO SECTIONS 552(b) and 552(a)(4)(B) OF THE FOIA REQUIRE REASONABLY SEGREGABLE PORTIONS OF THE RECORDS REQUESTED TO BE SUBMITTED FOR IN CAMERA REVIEW.

A. Introduction.

The IRS has failed to discuss in its brief two of the 1974 amendments to the FOIA which have a direct

bearing upon the disposition of this case in favor of the respondents, despite the assertion of Exemption 3 by the IRS.

The first of such amendments added the following sentence at the former end of Section 552(b):

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

The provisions of such new sentence must be read in connection with the new in camera review provision of Section 552(a)(4)(B), which provides:

> (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

As well stated in Part I-C of the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, 14 (February, 1975):

> The legislative history of these two related provisions indicates that Congress intended to codify a deletion principle, already applied in numerous instances by courts and agencies, so as to prevent the withholding of entire records or files merely because a portion of them are exempt, and to require release of non-exempt portions.

In providing that the additional language of subsection (b) was to apply not only to the original House proposal but to *all* exemptions, Senate Report No. 93-854, contains language which leaves no room for question.[16]

On the Senate floor, May 30, 1974, an outline was given as to the changes made by S. 2543. Insofar as

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[16] "The FOIA itself directs that 'To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details' when it makes information public. (§ 552(a)(2); see *Roses* v. *Department of the Air Force*, — F.2d — (2d Cir., March 29, 1974, No. 73-1264).) (sic) So also where files are involved will courts have to examine the records themselves and require disclosure of portions to which the purposes of the exemption under which they are withheld does not apply."

"This provision would apply if, for example, there were a request for a record in a file that had been opened in the course of an investigation that had long since been closed, but which file contained the name of an informer or raw data on innocent persons or confidential investigative techniques. Section 2(b) emphasizes what is presently understood by most courts but has gone unheeded by agencies; it would not be enough for the government to refuse disclosure of the record merely because it or the file it was in contained such exempt information, since deletion of that information would provide full protection for the purposes to be served by the exemption. Thus, the government could not refuse to disclose the requested records merely because it finds in those records some portions which may be exempt."

"The language originally proposed in S. 2543 as introduced provided that 'if the deletion of names or other identifying characteristics of individuals would prevent an inhibition of informers, agents, or other sources of investigatory or intelligence information, then records otherwise exempt under clauses (1) and (7) of this subsection, unless exempt for some other reason under this subsection, shall be made available with such deletions'. *The amended language is intended to encompass the scope of this original proposal but apply the deletion principle to all exemp-*

pertinent it states (120 Cong. Rec. S 9313 (daily ed. May 30, 1974)) (remarks of Senator Kennedy):

> Thirteenth. Segregable records. S. 2543 adds a new provision to the act stating that if exempt *portions* of requested records or files are severable, they should be severed—or deleted, as the case may be—and the nonexempt portions disclosed. Many courts are requiring this now, and the bill emphasizes the desirability of this approach in providing specifically that courts may order disclosure of "*portions*" of files or records as well as entire files or records. (Emphasis added.)

Continuing at S 9315:

> With the new provisions it should be clear that there can be no blanket claim of confidentiality under *any* of the exemptions. (Emphasis added.)[17]

B. Segregable Records.

Why were the new provisions added to the FOIA? In the amendments first proposed, the House of Repre-

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tions." (Emphasis added.) S. Rep. No. 93-854, 93d Cong., 2d Sess. 33 (1974)

[17] Senator Kennedy further stated:

> This new requirement is also consistent with the most judicial pronouncements in Freedom of Information Act cases, although unfortunately some courts are not adhering to the principle under some exemptions. The new lanugage in S. 2543 should extend this deletion principle to *all* cases, involving *all* exemptions. As one court observed, "it is a violation of the act to withhold documents on the ground that parts are exempt and parts nonexempt." "Suitable deletion may be made," said the court. In another case the court found that the legislative history of the Freedom of Information Act "does not indicate . . . that Congress intended to exempt an entire document merely because it contained some confidential information." And another court said that "identifying details or secret matters can be deleted from a document to render it subject to disclosure." (Emphasis added.) 120 Cong. Rec. S9315.

sentatives only considered amending Exemptions 1 and 7.

The sentence added to the end of Section 552(b) had its origin in the recommendations of the Administrative Conference of the United States at the 1972 Hearings.[18] The Senate added this sentence as an amendment and, in Senate Report No. 93-854, reported:

> . . . The spokesman for the American Bar Association suggested in the hearings that 'it would also be useful to amend the statute so as to make it clear that agencies are required to separate exempt from non-exempt information in a particular record, and make available the non-exempt information. The committee believes that this requirement is understood in the basic FOIA, and the inclusion of this amendment provides authority for the court during judicial review to undertake such separation if the agency has not. S. Rep. No. 854, 93d Cong., 2d Sess. 17 (1974)

The same Report, at pages 32-33, then states:

> A new paragraph is proposed to be added to section 552(b) requiring that where only a portion of a record is determined to be exempt from disclosure, the record must be disclosed with the exempt portion deleted. The direction expressed by the paragraph is consistent with one of the recommendations of the Administration Conference and with court interpretations of the FOIA.
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> * * *
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> In light of this new provision courts will have to look beneath the label on a file or record when the withholding of information is challenged. Courts have already held that where intra-agency memo-

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[18] *Hearings on U.S. Government Information Policies and Practices, supra* n. 11, at 1219.

randa are requested, opinion must be severed from purely factual material, with the latter being disclosable. *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 89, 91 (1973).

In *Mink* the respondents were attempting to obtain factual data concerning nuclear testing. When discussing whether such data would be exempt under Exemption 5, as well as Exemption 1, the Court stated:

> Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data. That decision should not be taken, however, to embrace an equally wooden exemption permitting the withholding of factual material otherwise available on a discovery merely because it was placed in a memorandum with matters of law, policy or opinion. It appears to us that Exemption 5 contemplates that *the public's access to internal memoranda will be governed by the same flexible, common sense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies.* And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents. 410 U.S. 73, 91 (Emphasis added.)

This same approach should be taken in this case. This Court should not permit the withholding of excise tax private letter rulings and technical advice memoranda, which constitute final opinions, statements of policy or interpretations of law which have been adopted by the IRS, nor index-digest cards and certain files, correspondence and communications which may relate to

taxable or non-taxable transactions or articles. Such opinions, statements and interpretations of law and the index-digest cards are generated by the IRS, are contained in its files, in most cases are never referred to in an excise tax "return" and are not required by law to be attached to an excise tax "return." As this Court succinctly stated in *Renegotiation Board* v. *Grumman Aircraft Engineering Corporation,* 421 U.S. 168, 192 (1975):

> The Freedom of Information Act imposes no independent obligation on agencies to write opinions. It simply requires them to disclose the opinions which they do write. *NLRB* v. *Sears, Roebuck & Co.* [421 U.S. 132]

The same certainly would hold true as to the other records generated by the IRS and requested by respondents. House Report No. 93-1380, 93d Cong., 2d Sess. (1974) adopted the Senate amendment, and the Conference Report likewise adopted "another unique Senate provision."[19]

C. In Camera Inspection and De Novo Review.

The in camera inspection and de novo review amendments of 1974 likewise received most careful consideration, following *Vaughn* v. *Rosen,* 484 F.2d 820, 823-826 (C.A. D.C., 1973), *cert. denied* 415 U.S. 977 (1974). See S. Rep. No. 854, 93d Cong., 2d Sess. 13-16 (1974). The same Report, at page 17, states:

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[19] Joint Committee Print, *Freedom of Information Act and Amendments of 1974* (P.L. 93-502), Source Book: Legislative History, Texts and Other Documents: House Committee on Government Operations, Subcommittee on Government Information and Individual Rights and Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, at 116 (1975).

> By expressly providing for in camera inspection regardless of the exemption invoked by the government. (sic) S. 2543 would make clear the congressional intent—implied but not expressed in the original FOIA—as to the availability of in camera examination in all FOIA cases. This examination would apply not just to the labeling but to the substance of the records involved.

A goodly portion of Congressional consideration of the in camera judicial inspection procedure was in its relation to the amendment of Exemption 1, more especially in the light of the holding in *Mink*, 410 U.S. 73 (1974).[20] However, as lucidly summarized by the Attorney General:

> The 1974 Amendments modify the national defense and foreign policy exemption of the Act, 5 U.S.C. 552(b)(1), and add an express provision concerning in camera judicial inspection of records sought to be withheld under *any* exemption including exemption 1. . . . The provision concerning in camera judicial inspection affects the manner in which a court may treat classified records which an agency seeks to withhold. A.G. Memo at 1. (Emphasis added.)

D. Attitude of Petitioner During 1972 Hearings.

In connection with the 1972 Hearings previously mentioned, the Staff of the Subcommittee submitted a number of questions to the IRS in advance of the hearings. One of such questions related to the justification of the IRS not disclosing private letter rulings

[20] See H. R. Rep. No. 1380, 93d Cong., 2d Sess. 8-9 (1974) (Conference report identical); S. Rep. No. 854, 93d Cong., 2d Sess. 13-17, 28-31 (1974); Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, Pt. I-A, 3, 4 (February, 1975).

with identifiabe details deleted. The IRS answered that such disclosures would be a "time consuming and expensive process" and "would be of no benefit to anyone."[21]

Still another question was:[22]

> 35. Under what legal authority does the Internal Revenue Service deny requests for copies of your unpublished tax rulings *after the deletion of any information that would identify the taxpayer(s) involved?* (Emphasis added.)

The IRS answered:[23]

> 35. We find no provision in the Freedom of Information Act requiring the deletion of identifying materials from unpublished tax rulings which are not of precedential significance.

Contrast the answers to these questions with the following statement by Senator Hruska on the Senate floor[24] on the "reasonably segregable portion" amendment to Section 552(b):

> The provision dealing with deletion of segregable portions of records is procedural and requires the agency to segregate the disclosable portion of a record from the nondisclosable and to grant access to the disclosable portion. *This provision reflects existing law,* but is incorporated in this bill to clarify and emphasize the point. Being procedural in nature, it does not aid in the substantive

[21] Hearings on U.S. Government Information Policies and Practices, *supra*, n. 11, at 2037.

[22] *Id.* at 2038.

[23] *Id.* at 2047.

[24] 120 Cong. Rec. S9317-18 (daily ed. May 30, 1974).

> analysis whether a particular exemption applies to a record or portions thereof. Instead, it applies once the court determines that portions of a record are disclosable, requiring the agency to divulge those portions. Thus, it would not apply where, for instance, an entire file was exempt such as under exemption 7. (Emphasis added.)

Both *Bristol-Myers Company* v. *Federal Trade Commission,* 424 F.2d 935, 939 (C.A.D.C.) *cert. denied,* 400 U.S. 824 (1970), cited in the Attorney General's Memorandum on the 1974 FOIA Amendments, and *Welford* v. *Hardin,* 315 F. Supp. 768, 770 (D.D.C. 1970) supported Senator Hruska's position, and both antedated the foregoing answers of the IRS by approximately two years. See also the remarks of Senator Kennedy at 120 Cong. Rec. S 9313 (daily ed. May 30, 1974), n. 17, *supra,* 62.

In continuing his outline of changes effected by S. 2543, Senator Kennedy stated:

> Sixth. In camera and de novo review. Presently de novo review with in camera inspection of documents is allowed in all cases except where withholding is justified as being in the interest of national defense or foreign policy. This exception is dictated by the Supreme Court's interpretation of the Freedom of Information Act in the case of Environmental Protection Agency against Mink. S. 2543 would reverse Mink and extend full in camera judicial review to all areas, including those involving classified documents. 120 Cong. Rec. S 9313.

Applying the foregoing legislative history to the records sought in this case by respondents, it appears clear that only if this Court should hold that every word of an excise tax private letter ruling or technical

advice memorandum, including the opinions and interpretations of law contained therein, constitute a "return" within the meaning of Section 6103, may the IRS withhold disclosure of such records. Under the present mandate of Congress as detailed aforesaid, if certain materials or matters within the record are "reasonably segregable," as are opinions and interpretations of law, then such materials or matters must be provided to respondents. This also is the view of the present Attorney General. Attorney General's Memorandum on the 1974 FOIA Amendments, at 14-15, he compares the new language at the end of Section 552(b) with the new review provision of Section 552(a)(4)(B) as follows:

> In order to apply the concept of "reasonably segregable," agency personnel should begin by identifying for deletion *all* portions of the requested *document* which are to be withheld in order to protect the interest covered by the exemption or exemptions involved. The remaining material (assuming it constitutes information that is responsive to the request) must be released if it is at *all* intelligible . . . (Emphasis added.) (Footnote omitted).

Clearly, opinions and interpretations of excise tax law contained in private letter rulings and technical advice memoranda are not necessary for the mechanical computation of tax due and do not contain the requisite facts or figures to constitute a "return" required to satisfy Section 6011 of the I.R.C. *Florsheim Brothers Drygoods Co.* v. *United States,* 280 U.S. 453 (1930). Such opinions and interpretations may easily be separated from the name of a taxpayer, privileged and confidential statistical and financial data, is used, and any trade secrets mentioned, much the same as the

IRS has already done in the four private letter rulings set out in the Appendix, *infra*. Respondents submit that such opinions and interpretations of law are matters which are nonexempt and, therefore, reasonably segregable under Section 552(b).

Even before the 1974 Amendments were enacted, the district court in this case provided for a method of in camera review by, if necessary, a special master (A. 52-53). This procedure was suggested to the court by respondents at the trial. The court of appeals approved the procedure. (A. 78 *et seq.*)

Finally, Congress, as late as November 12, 1975, in considering the proposed Tax Reform Act of 1975, and particularly the possibility of disclosure by the IRS causing financial harm to a taxpayer whose commercial or financial information might be disclosed, offered this practical solution:

> Where the structure of a transaction is disclosable but disclosure of the amounts involved is not allowed under this rule, your committee believes that in normal circumstances the application of the tax law can be fully demonstrated by using "artificial" numbers, for example, by substituting $8X and $9X for $400 and for $450. Report No. 94-658 of the Committee on Ways and Means on H.R. 10612, 94th Cong., 1st Sess. 317 (1975)

Such has been the practice of the IRS for a number of years in some of its published revenue rulings and procedures applicable to manufacturers excise tax.[25]

[25] E.g. Rev. Rule 65-154, 1965-1 Cum. Bull. 488 (computation of constructive sale price under § 4216(b) of the I.R.C. which section the IRS stresses on pages 30 and 31 of its brief); Rev. Rul. 71-170, 1971-1 Cum. Bull. 365 and Rev. Proc. 71-24, 1971-2 Cum. Bull. 552 (computation of constructive sales price under § 4216(b)(1), which section is cited by the IRS on page 30 of its brief); Rev. Rul. 69-394, 1969-2 Cum. Bull. 206 (determination of manufacturers tax base when taxable and non-taxable articles are sold as a unit at a single price) and Rev. Rul. 70-444, 1970-1 Cum. Bull. 228, amplifying Rev. Rul. 62-68, 1962-1 Cum. Bull. 216 (computation of excise tax under § 4216(b)(1)(C)).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN L. KING
MATTHEW C. MCKINNON
2600 Detroit Bank & Trust Bldg.
Detroit, Michigan 48226

MILTON J. MEHL
2012 Continental Life Bldg.
Fort Worth, Texas 76102

WILLIAM A. BARNETT
135 S. LaSalle Street
Chicago, Illinois 60603

GERALD C. RISNER
135 S. LaSalle Street
Chicago, Illinois 60603

GEORGE D. WEBSTER
1747 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Attorneys for Respondents

APPENDIX

5 U.S.C. (1970 ed. and Supp. IV) 522 [as amended by Sections 1(b)(1) and 2(c), Pub. L. 93-502, 93d Cong., 2d Sess., 88 Stat. 1561, 1564]. Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings [Italics indicate 1974 amendments]

(a) Each agency shall make available to the public information as follows:

• • • • •

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing.

• • •

(3) *Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and*

procedures to be followed, shall make the records promptly available to any person.

• • •

(4)(B) *On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.*

• • •

(b) This section does not apply to matters that are—

(1)(A) *specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense of foreign policy and (B) are in fact properly classified pursuant to such Executive order;*

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) *investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings. (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;*

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

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Internal Revenue Code of 1954, as amended (26 U.S.C.)

§ 6103. PUBLICITY OF RETURNS AND DISCLOSURE OF INFORMATION AS TO PERSONS FILING INCOME TAX RETURNS

(a) Public record and inspection.—

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, subchapter B of chapter 37, and chapter 41, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person, a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Secretary or his delegate. The Secretary or his delegate may prescribe a reasonable fee for furnishing such copy.

* * *

§ 7213. UNAUTHORIZED DISCLOSURE OF INFORMATION

(a) Income returns.—

(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

* * * * *

(b) Disclosure of operations of manufacturer or producer.—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment.

* * * * *

Treasury Regulations on Procedure and Administration

1938 Regulations, Art. 55(b)-5:

For the purposes of this article the word "returns" shall include information returns, schedules, lists, and other

written statements filed with the Commissioner designed to be supplemental to or to become a part of *income* returns. (Emphasis added.)

1941 Regulations, Sec. 29.55(b)(1)

For the purpose of this section, the word "returns" shall include information returns, schedules, lists, and other written statements filed with the Commissioner designed to be supplemental to or to become a part of *income* returns. (Emphasis added.)

1953 Regulations, Sec. 39.55-1

For the purposes of this section the word "returns" shall include information returns, schedules, lists, and other written statements filed with the Commissioner designed to be supplemental to or to become a part of *income* returns. (Emphasis added.)

Internal Revenue Manual—Selected Sections

(11)111
ROLE OF TECHNICAL

(1) The Assistant Commissioner (Technical) acts as the principal assistant to the Commissioner in providing basic principles and rules for the uniform interpretation and application of the Federal tax laws (other than alcohol, tobacco and firearms taxes under Subtitle E of the Internal Revenue Code). The function of providing basic technical rules and principles for the guidance of taxpayers and Service personnel is that of the National Office. The Regional and District Offices are, however, responsible for certain functions, such as the issuance of determination letters, that are coupled with and supplement the technical activities of the National Office. Part XI of the Manual provides policies, principles, and procedures for the execution of the foregoing responsibilities of the National Office Technical organization and those activities of the Regional

and District Offices that are directly related to the technical work of the National Office.

(2) In carrying out its mission, the Technical organization conducts a number of programs. These are reflected in functional statements set forth in IRM 1113.9.

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(11)244.2
INDEX-DIGEST CARD FILES

(1) *General Description.* TCR maintains index-digest cards on certain rulings, technical advice memorandums, technical studies, certain court decisions, and other pertinent material, as an aid in researching Federal tax questions. (A complete list of the types of documents indexed and/or digested appears in Exhibit (11)240-2.) There are digests of published rulings and procedures, interim ("preliminary") digests of rulings and procedures recommended for publication, and digests of rulings and other material that do not meet the standards for publication but are classified as "reference," that is, having future reference or administrative value. Opinions of the Chief Counsel's Office (GCM's) are not digested separately but are noted on the index-digest card covering the case involved. Actions on Decisions in court cases where there is a digest of the court decision in the file are also noted on the card. When a ruling or procedure is revoked, modified, amended, or otherwise affected by a subsequent ruling or procedure, that fact is noted on the card. The actual case files for rulings, technical advice memorandums, etc., digested are maintained in the Records Section and may be requisitioned in the usual manner (see IRM (11)254).

(2) *Purpose.* The index-digest cards (and the related reference case files maintained by the Records Section) enable employees to utilize prior research and to ascertain what interpretations have been made in other cases.

(3) *Designation of Rulings and Other Material for Digesting.* Rulings and other documents are classified for digesting by the initiator, subject to approval by the reviewers, when executing Form M-3514 (Publication, Environmental, and File Classification Recommendations), Exhibit (11)630-5, by checking the block beside "Revenue Ruling or Procedure" or "Reference" in Item 6 of such form. See IRM (11)633.8.

(4) *Organization of Index-Digest Card Files.*

(a) *Primary Index-Digest Card Files.* The cards on income tax, estate tax, and gift tax matters are filed according to the 1954 and 1939 Code sections to which they relate, with further breakdowns under subsections and, in some instances, under subject. Cards involving employment and excise taxes are filed under index headings based on subject matter.

(b) *Auxiliary Card Files.* In addition to the primary index-digest card files, the following auxiliary card files are maintained.

1 Index-digest cards on income, estate, and gift tax matters, filed by case name or other designation.

2 Cards on employment and excise tax matters showing name of case, date, Branch symbols, and index headings. These are filed by case name.

3 Index cards for all Revenue Rulings and Revenue Procedures (filed by number of Ruling or Procedure) on which are recorded the name of the case on which the Revenue Ruling or Procedure is based, the date of the letter ruling issued in the case, the symbols of the originating Office, the Internal Revenue Bulletin citation, and, if the ruling is subsequently revoked, superseded, modified, or amplified, a notation to that effect.

4 GCM number cards (filed by GCM number) which cross-reference each GCM relating to a particular ruling.

5 Cards on numbered announcements published in the Internal Revenue Bulletin containing short digests of the announcements, showing the IRB citation, and the title of the announcement file (if any), and filed by subject and by announcement number.

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(11)610

(11)611 Nature and Purpose

The Internal Revenue Service issues interpretations to taxpayers concerned in order to advise them or their authorized representatives, upon written request, of the proper application to specific situations of the provisions of the internal revenue laws, related statutes and regulations, or Revenue Rulings and other precedents published in the Internal Revenue Bulletin. This is done to promote voluntary compliance with, and consistent administration of, the internal revenue laws in accordance with the intent and purpose of Congress.

(11)612 Scope

(1) The Service answers written inquiries of individuals and organizations, whenever appropriate in the interest of sound tax administration, advising them as to their status for tax purposes and as to the tax effect of their acts or transactions. The procedures described in this Chapter are applicable to those written requests for rulings, or determination or opinion letters, (other than those relating to alcohol, tobacco and certain firearms taxes) from taxpayers or their representatives as to the position of the Service in determining the tax consequences of a specifically described transaction, act, situation, etc.

(2) If a request for a ruling, or a determination or opinion letter, is so lacking in facts as to preclude a precise determination of the tax consequences, the reply may supply such information as appears to be relevant on an

assumptive basis where it is believed that general information will suffice. However, such reply shall state that sufficient facts have not been furnished for a specific ruling, or determination or opinion letter, to be issued.

(3) The interpretation of tax convention provisions by the Service will reflect, so far as principles of interpretation of treaties generally permit, the spirit, substance and broad objectives of the convention. The Service will accept interpretations placed by a foreign tax convention country on its revenue laws that do not affect the tax convention. However, when such interpretation conflicts with a provision in the tax convention, reconsideration of that interpretation may be requested.

(4) Inquiries received from taxpayers, tax practitioners, Members of Congress, and others that relate to the position of the Service on broad problems or that constitute general inquiries are not covered in this Chapter, but are handled under the general correspondence rules. See IRM (11)260.

(11)613 Definitions

(11)613.1 Ruling

A "ruling" is a written statement issued to a taxpayer or his authorized representative by the National Office that interprets and applies the tax laws to a specific set of facts. Rulings are issued only by the National Office. The issuance of rulings is under the general supervision of the Assistant Commissioner (Technical). It has been largely redelegated to the Directors of the Income Tax Division and the Miscellaneous and Special Provisions Tax Division and, in turn, to the Branches in those Divisions. See IRM (11)631.

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(11)616.2 Areas in Which Rulings Are Issued by the National Office

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(3) In employment and excise tax matters (except excise taxes imposed under Chapter 42 of the Code), the National Office issues rulings with respect to prospective transactions and to completed transactions either before or after the return is filed. However, the National Office will not ordinarily rule with respect to an issue, whether related to a prospective or a completed transaction, if it knows or has reason to believe that the same or an identical issue is before any field office (including any branch office of the Appellate Division) in connection with an examination or audit of the liability of the same taxpayer for the same or a prior period.

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(11)633.3
Preparation of Ruling Letter

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(5) The ruling letter should resolve fully all issues, be in language as nontechnical as the circumstances will permit, be technically accurate, legally sound, as concise as is feasible without sacrificing clarity, and should contain an explanation of the reasons for the conclusions reached if the ruling is adverse. (See IRM (11)633.7 for instances where a separate file memorandum is required.) Where it is necessary in the letter to refer to some particular section of the law or regulations, such section is usually quoted in order that there may be no misunderstanding as to the language thereof. Should the taxpayer cite an authority that is not considered controlling as to the issue presented and the position being taken on the issue is adverse, the ruling letter should distinguish the cited authority from the issue presented provided it is necessary to do so in support of our position. This is particularly true of Revenue Rulings, regulations, and court decisions the Service has acquiesced in or otherwise announced it will follow that appear to bear closely on the issue. Where an issue has been extensively briefed with numerous citation of authorities, normally only those authorities bearing most

directly on the issue need be distinguished. Where the circumstances of the case indicate the propriety of furnishing the taxpayer with any published guide material available for distribution, such material should be enclosed.

• • •

(11)712
AUTHORITY

(1) The Assistant Commissioner (Technical), acting under a delegation of authority from the Commissioner of Internal Revenue, is exclusively responsible for providing technical advice on any issue involving the establishment of basic principles and rules for the uniform interpretation and application of tax laws under the jurisdiction of the Internal Revenue Service.

(2) The authority to issue technical advice has been redelegated to the Branches in the Income Tax Division and the Miscellaneous and Special Provisions Tax Division, within their respective areas of jurisdiction.

(11)713
TECHNICAL ADVICE DEFINED

(1) *Technical advise* is advice or guidance furnished by Technical in response to a request from a district office as to the interpretation and proper application of internal revenue laws, related statutes, and regulations to a specific set of facts involved in:

(a) The examination of a specific taxpayer's return or consideration of a taxpayer's claim for refund or credit;

(b) The proposed revocation or modification of a ruling to a taxpayer; or

(c) A proposed revocation of tax-exempt status.

(2) Certain other matters referred to technical are considered technical advice. See IRM (11)71(11).1:(6), (7), and (8).

• • •

(11)721
REQUESTING TECHNICAL ADVICE

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(2) Taxpayers may initiate requests for technical advice in accordance with the following:

(a) During the course of an examination or a conference in a District office, a taxpayer or his representative may request that an issue be refered to the National Office for technical advice on the grounds that a lack of uniformity exists as to the disposition of the issue, or that the issue is so unusual or complex as to warrant consideration by the National Office. While taxpayers are encouraged to make written requests setting forth the facts, law, and arguments with respect to the issue, and reasons for requesting National Office advice, a taxpayer may make the request orally.

• • •

(11)722.7
PREPARATION OF TECHNICAL ADVICE MEMORANDUM AND TRANSMITTAL MEMORANDUM

(1) *General:*

• • •

(d) It is the general practice of the Service to furnish a copy of the technical advice memorandum to the taxpayer, upon his request, after it has been adopted by the District Director. However, where no definitive answer is given to the specific question presented, where the factual submission is such as to indicate that the issue should be decided by the district office, where it would not be in the interest of a wise administration of the tax laws, or where the taxpayer was not advised of the request for technical advice (IRM (11)721:(3)(g)), a copy of the technical advice memorandum will not be furnished the taxpayer. In those situations the technical advice memorandum contains a statement that a copy of the technical advice memorandum will not be made available to the taxpayer.

. . .
. . .
. . .

June 20, 1950

Gentlemen:

Reference is made to your letter dated April 13, 1950, requesting information as to whether a network radio program with local cut-in identifying commercials is considered to be local cooperative advertising.

You state that you are now able to purchase local cut-in identifying commercials on a network radio program and would like to include this type of advertising in your local dealer advertising program. Such advertising would consist of a network radio program which local announcers for the various stations would interrupt at the beginning, middle, and closing with an announcement similar to, "See your nearest . . . dealer," or, "See your . . . dealer, John Jones Motors, located at 123 A Avenue, Portland, Oregon."

It is the position of the Bureau that the local cut-in identifying commercials described above may be considered to be local advertising and the cost of such commercials may be included in the cooperative advertising plan approved by the Bureau in a ruling dated June 1, 1949.

Very truly yours,

. . .

Charles J. Valaer
Deputy Commissioner.

. . . .
. . . .
. . . .
. . . .

March 5, 1951

Gentlemen:

Reference is made to your letter dated December 27, 1950, requesting a ruling as to the application of manufacturers' excise tax to your charges to dealers located within areas covered by television broadcasts advertising your products, and to your letter dated December 11, 1950, addressed to "Zones and Dealers", which was left with this office at the conference held on December 18, 1950.

You state that a charge of .... per automobile is made to dealers located within "live" broadcast areas, and a charge of .... per automobile is made to dealers located within delayed (Kinescope) broadcast areas. No such charge is made to dealers located outside these areas, and you advance reasons as to why television advertising should be considered as local advertising.

It is the opinion of the Bureau that network television programs, such as your "Holiday Hotel" program, do not represent a form of local advertising, even though the broadcast areas are restricted to the effective range of each network station involved.

Inasmuch as your charges for television network advertising appear to be made to dealers on a compulsory, nonrefundable basis, it is held that such charges must be included as a part of your sales . . . . price on which tax is computed. However, if you subsequently readjust your price to a dealer by allowing him an amount for actual expenses he incurs for announcements by his local station during breaks in a network program, a properly supported claim for credit or refund may be allowed for the proportionate amount of tax applicable to the readjustment in sale price.

Very truly yours,

/s/ Charles J. Valaer
Charles J. Valaer
Deputy Commissioner

. . . .
. . . .
. . . .
. . . .

July 21, 1947

Gentlemen:

Reference is made to your letter dated June 17, 1947, requesting advice as to whether a separate charge for co-operative advertising may be excluded from the sales price for the purpose of computing tax under section 3403 of the Internal Revenue Code, as amended.

This charge is credited to the dealer's individual account and all expenditures for local advertising in one area are charged to that account or where there are two or more dealers in the same town the contributions are maintained in a joint account against which expenses for local advertising are charged. The principal advertising mediums are local newspapers and billboards.

A copy of the dealer's sales agreement was submitted with your letter. In the case of billboard advertising charged to a joint account, the names of the dealers do not appear but the advertisement states "See your local dealer." If an individual dealership is terminated the unspent portion of his contribution remains in the joint account for the benefit of the remaining and succeeding dealers. Where the dealer has an individual account his remaining contribution is refunded upon termination of his dealership.

It has been held that separate charges for local advertising may be excluded from the sale price for the purpose of computing tax under the above section of the Code on sales of automobiles provided such charge is shown separately on the invoice and provided the cost of the local advertising equals or exceeds the amount charged. Tax is properly due on any amounts charged and collected as local advertising and not actually expended for that purpose.

It is, therefore, held that the charge for local advertising in the instant case both with respect to joint and individual dealership accounts may be excluded from the sale price for the purpose of the tax so long as the amounts involved are expended for local advertising only.

Very truly yours,

/s/ D. S. Bliss
D. S. Bliss
Deputy Commissioner

...
...
...

Jan 31, 1964
T:R:Ex:SM
...

Attention: ...

Gentlemen:

The District Director of Internal Revenue, . . . has referred to this office your letter which was in response to our letter to you of May 9, 1962. In that letter, we requested additional information concerning your products in order that we might determine whether, for purposes of the manufacturers excise tax, your sales of such products come under the special rule provided by section 4216(b)(2) of the 1954 Internal Revenue Code.

Prior to October 1, 1962, the applicability of the special rule to any article, subject to the manufacturers excise taxes depended, in part, upon provision (C) of section 4216(b)(2), which required that "the normal method of sales for such articles within the industry is not to sell such articles at retail or to retailers, or combinations thereof." However, provision (C) was amended by Public Law 87-858, C.B. 1962-3, 206, effective October 1, 1962, to remove this requirement with respect to all articles subject to an ad valorem manufacturers excise tax with the exception of (1) automobiles, trucks, etc., (2) business machines, and (3) matches. Thus, any articles subject to ad valorem manufacturers excise taxes, other than those falling within these three categories, are no longer subject to provision (C) with respect to sales made on and after October 1, 1962.

With respect to automobile "parts or accessories", which are taxable under Code section 4061(b), Revenue Ruling 63-105, Internal Revenue Cumulative Bulletin 1963-1, page 244, concludes that the automobile "parts or accessories"

industry comes within the scope of condition (C) during the period January 1, 1959, through September 30, 1962. Accordingly, in the case of articles which are taxable under the provisions of section 4061(b) of the Code, the tax may be computed under the special rule with respect to sales at retail or to retailers during that period by manufacturers, producers, or importers who qualify under conditions (A), (B), and (D) of section 4216((b)(2).

The latest information submitted by you indicates that you manufacture both taxable and nontaxable automotive products. You indicate that your taxable products consist of the articles listed below.

(1) Articles subject to the tax imposed by Code section 4061(a) on automobile truck bodies and chassis:

Truck Platforms

(2) Articles subject to the tax imposed by Code section 4061(b) on automobile "parts or accessories":

Hydraulic Truck Conversion Hoists
Hydraulic Truck Ramp Hoists
Truck Cab Protectors
Truck Approach Plates
Truck Combination Bumper and Approach Plates
Truck Dock Loading Leg
Truck Tie Down Hooks
Truck Tool Boxes
Truck Light Cluster Sets
Truck Mud Flaps
Truck Stop Tail and Turn Signal Lights
Truck Trailer Hitch
Truck Tire Carriers

Other information submitted indicates that you sell the above articles to wholesale distributors and to dealers (who,

we presume are persons who resell to consumers). Statistics furnished by you reveal that your sales to dealers have constituted approximately 15 to 30 percent of your total sales of these articles during the past four years, indicating you are regularly engaged in selling to dealers.

You state that all your sales are transactions at arm's length and that the prices on your products have been determined without record to tax benefit under the special rule of Code section 4216(b)(2). You also state that the list prices of your products are the same to all distributors and dealers and that your distributor discounts are 40 percent off the list prices while your dealer discounts are 20 percent off the list prices.

Based on that information submitted and the stated facts, we have determined that you meet the requirements of provisions (A), (B) and (D) of Code section 4216(b)(2) with respect to your sales of automobile "parts or accessories." Therefore, since, subsequent to October 1, 1962, provision (C) is no longer applicable to such articles, you may use the special rule in computing your tax with respect to your sales of parts and accessories on and after that date. Furthermore, since the automobile "parts or accessories" industry met the requirement of provision (C) prior to October 1, 1962, the special rule would also apply to sales of such articles for the period January 1, 1959, through September 30, 1962. In accordance with Code section 4216(b)(2), the tax on your sales to dealers should be computed on the lower of (1) the actual price for which you sell the articles, or (2) the highest price for which you sell the articles to wholesale distributors. In either case, the price is subject to the adjustments for containers, transportation, local advertising, etc., provided by sections 4216(a) and 4216(f) of the Code.

With respect to your sales of "truck platforms", since such articles are subject to the tax imposed by Code section 4061(a) on automobile truck bodies and chassis, sales of

these articles must still meet the requirements of provision (C) of the special rule. Information available to this office indicates that the normal method of sales for articles taxable under Code section 4061(a) is to sell such articles at retail, to retailers or dealers, or combinations thereof, rather than to wholesale distributors. Consequently, it is our determination that this industry does not qualify for the special rule under section 4216(b)(2). Therefore, it is concluded that the special rule does not apply to your sales of the "truck platforms" and the tax on the sales of these articles should be computed on the actual price for which they are sold to wholesale distributors and dealers, subject to the aforementioned adjustments provided by Code sections 4216(a) and 4216(f).

Very truly yours,

/s/ Bernard H. Fischgrund
Bernard H. Fischgrund
Chief, Excise Tax Branch

...
...

1-29-64

Exh. (11)700-2 Technical Advice Memorandum

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM
(Original and copies date stamped by T:PS:T)

District Director
(Name of District Office)
Taxpayer's Name:
Taxpayer's Address:
Taxpayer's Identification No.:
Years Involved:
Date of Conference: (*OR* No Conference Held)

Issues

State the issues as presented by the District. Also, whenever appropriate, state in clear, precise language any additional issues that have been identified that were not specifically raised by the incoming correspondence, or restate the issue presented by the District to pinpoint the real question to be decided.

Facts

The statement of facts incorporated in the technical advice memorandum should be set out concisely but without any sacrifice of clarity. The essential facts should be fully presented. Short quotations from the incoming statement may be used as an aid in definitely pinning down particular areas when the conclusion depends on the interpretation of such language. However, lengthy quotations from documents contained in the file are to be avoided wherever practicable.

Applicable Law

This part of the document should set forth clearly and concisely the pertinent law, regulations, published rulings of the Service, and case law or other precedent. Care should

be taken that all citations are directly in point. Quotations which are helpful may be used judiciously, but lengthy ones are to be avoided wherever practicable.

Rationale

Sufficient rationale must be provided to bridge any gaps between the issue, law, and conclusion reached.

Conclusion

A specific statement as to the conclusion reached with respect to each issue is the final important step. These conclusions must be written to leave no doubt as to their meaning and to make it clear they are based solely on the facts presented.

(If a copy of the technical advice memorandum is not to be given to the taxpayer, that fact should be noted here.)

In summary, it is our function to promote uniformity, clarity, and responsiveness and, to the extent practicable, to insure an orderly method of approaching a technical advice problem. It is not intended in any way to restrict originality or ingenuity on the part of the writer, nor is it intended to prevent necessary or desirable deviation from the pattern where proper.

Form 720
(Rev. Jan. 1970)
Department of the Treasury
Internal Revenue Service

Quarterly Federal Excise Tax Return

Use to report Excise Taxes for 1974.

Part I

Facilities and Services	Rate	Tax	Ref. No.
Toll telephone service	6%		22
Teletypewriter exchange service			
Local telephone service			
Transportation of persons by air	5%		26
Use of international air travel facilities	$3.00 per person		27
Transportation of property by air	5%		28
Policies issued by foreign insurers	(*)		30
Manufacturers			
Truck, bus, and trailer chassis and bodies; tractors	10%		33
Parts or accessories for trucks, etc.	8%		48
Fishing rods, etc., and artificial lures, etc.	10%		41
Pistols and revolvers	10%		32
Firearms	11%		46
Shells and cartridges	11%		49

Products and Commodities	Rate	Tax	Ref. No.
Sugar	(*)		60
Diesel fuel and special motor fuels	(*)		61
Gasoline (manufacturers tax)	4¢ gal.		62
Fuel used in noncommercial aviation — Fuel other than gasoline	7¢ gal.		69
Fuel used in noncommercial aviation — Gasoline (retailers tax)	3¢ gal.		14
Lubricating oil	6¢ gal.		63
Tires — highway vehicle type, inflated	10¢ lb.		66
Tires — highway vehicle type, other	5¢ lb.		
Inner tubes	10¢ lb.		67
Tread rubber (camelback)	5¢ lb.		68
TOTAL TAX (Enter here and in Item 1 below.)			

*See instructions on page 2.

Part II

1. Total tax. (Before making entries in items 1 to 9, compute your total tax in Part I above.)
2. Adjustments. (See instructions. Attach statement explaining adjustments.)
3. Tax as adjusted. (Item 1 plus or minus Item 2.)

4. (a) Record of Tax Liability. (See instructions on page 4.)

Period		Amount of Liability
First Month	1st–15th day	
	16th–last day	
	Total for month	
Second Month	1st–15th day	
	16th–last day	
	Total for month	
Third Month	1st–15th day	
	16th–last day	
	Total for month	
(b) Total Liability for Quarter		

(b) Record of Federal Tax Deposits

Date of deposit	Amount

(c) Final deposit made for quarter (see note under Item 7)
(d) Total deposits for quarter (including final deposit made for quarter)
5. Overpayment from previous quarter
6. Total deposits (Item 4(d) plus Item 5)
7. Undeposited taxes due (Item 3 less Item 6; this should be $100 or less). Pay to Internal Revenue Service
Note: If undeposited taxes due at the end of the quarter are more than $100, the entire balance must be deposited. This deposit must be entered in the deposit schedule above in Item 4(b).
8. If Item 6 is more than Item 3, enter excess here ▶ $ and check if you want it: ☐ applied to your next return, or ☐ refunded to you.
9. If not liable for returns in succeeding quarters, write "FINAL" here ▶ and return this form to your Internal Revenue Service Center.

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete.

Signature ▶ Title (Owner, etc.) ▶ Date ▶

Please enter your name, address, employer identification number, and calendar quarter of return, if not printed. (If not correctly printed, please change.)

Quarter ending

Employer identification number

T	
FF	
FS	
FP	
I	
T	

If your address is now different from previous return, check here ▶ ☐

Please return this form to your Internal Revenue Service Center (See last item of Instructions, "Where to File").

Form 720 (Rev. 1-70)

Instructions

• • •

You must file a return for each quarter whether or not you incurred any liability. If you have no tax to report, enter "None" in item 3.

Adjustments.—Generally, an adjustment may be allowed for all the taxes reported on Form 720 to correct mathematical errors or to adjust payments of tax on transactions, charges, or processing that are entitled to be made tax free.

Enter in item 2 the total of any adjustments claimed. If you claim an adjustment, attach a statement explaining the basis for it and state that you have the required supporting evidence. You must identify the IRS Numbers being adjusted, and the amount of adjustment claimed for each.

• • •

Records.—Keep on file at your principal place of business or some other convenient location, duplicate copies of your return and accurate records and accounts of all transactions. They must contain sufficient information to indicate whether the correct amount of tax has been computed and paid. Also, keep records and information in support of all adjustments claimed and all exemptions. In the case of most taxes reportable on Form 720, keep your records at least four years from the date: (1) the tax becomes due, (2) the tax is paid, (3) an adjustment is claimed, or (4) a claim for refund is filed, whichever is later. If required, your records must be available for inspection by the Internal Revenue Service.

• • •

Manufacturers

These taxes apply to the sale or use by the manufacturer, producer, or importer of the articles listed.

Basis for tax and adjustments.—Generally, the tax is computed on the price for which the taxable article is sold or leased. If a taxable article is sold or leased under a conditional sales contract, installment payment contract, or chattel mortgage arrangement, compute and pay tax on each payment received during the quarter covered by the return. For exclusion from the sale price of finance charges, consult your District Director. Consult him also on special rules that apply to the lease of any article.

If charges for transportation, delivery, insurance, and installation are included in the manufacturer's sale price, you may adjust the price by deducting the actual amount paid or incurred for such expenses. For the circumstances under which adjustments may be made and about the evidence required to support such adjustments, consult your District Director or the applicable regulations. Adjustment of the manufacturer's sale price may also be made for discounts, rebates, and other similar allowances granted to the purchaser. But such discounts, etc., may not be anticipated. Adjustments may only be made if the purchaser has taken advantage of the discount, etc., before the return is required to be filed.

If the adjustments are made or the required evidence is obtained after the return is filed, the amount of tax involved may be considered an overpayment and you may then take a credit for that amount on a later return, or file a refund claim.

Tax shall be computed on a price established by the Commissioner of Internal Revenue if an article is sold by the manufacturer or producer at retail, on consignment, or otherwise than through an arm's-length transaction at less than the fair market price, or if the article is used by the manufacturer or producer in a manner subject to tax.

• • •

Depositary Method of Payment

If you are liable in any calendar quarter for more than $100 of excise taxes, you are required to make semimonthly, monthly or quarterly deposits with an authorized commercial bank depositary or a Federal Reserve bank, in accordance with specific instructions below.

If you are liable for $100 or less of taxes for a calendar quarter (or your total liability for a calendar quarter, less any deposits for the quarter, is $100 or less), you must either pay the taxes with your quarterly return or deposit them with an authorized commercial bank or Federal Reserve bank.

• • •

When to File

A return must be filed for each quarter of the calendar year as follows:

Quarter covered	All excise taxes other than trans. and comm. due on or before	Trans. and comm. due on or before
January, February, March	April 30	May 31
April, May, June	July 31	August 31
July, August, September	October 31	November 30
October, November, December	January 31	February 28

For all excise taxes other than those on transportation and communications, you are allowed an additional 10 days for filing your return if it shows timely deposits in full payment of the taxes due for the quarter.

• • •

LAW OFFICES
WEBSTER & KILCULLEN
1747 PENNSYLVANIA AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20006
(202) 785-9500

June 26, 1973

GEORGE D. WEBSTER
JOHN L. KILCULLEN
T. NEAL COMBS
ARTHUR L. HEROLD
WILLIAM I. ALTHEN
S. W. ZANOLLI
DAVID S. SMITH

OF COUNSEL, HARRY S. DENT

Mr. Donald C. Alexander,
Commissioner of Internal Revenue
Internal Revenue Service
1100 Constitution Avenue, N.W.
Washington, D.C. 20224

Attention: CP:CD

In re: Request for Inspection and Copying of Documents under the Freedom of Information Act

Dear Mr. Alexander:

The undersigned, individually and jointly, request permission to inspect and copy the following documents pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552, and Treasury Regulations, § 601.702, 26 C.F.R.:

(1) All unpublished private rulings and/or letter rulings originating in the Miscellaneous and Special Provisions Tax Division, Excise Tax Branch, of the Office of Assistant Commissioner (Technical),

Internal Revenue Service, which were issued between January 1, 1947 and to the date hereof to manufacturers of automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semi-trailer chassis, truck and bus trailer and semi-trailer bodies, and tractors of a kind chiefly used for highway transportation in combination with a trailer or semi-trailer, or to any trade association of any one or more such manufacturers, in which determinations were made of:

(a) All items includable or excludable in the price for which a taxable article is sold under § 4216(a) of the Internal Revenue Code (or any predecessor section) and any Regulations issued pursuant thereto.

(b) The methods, means, formulae or procedures for determining or computing by a manufacturer of taxable articles of the applicable constructive sales price, under § 4216(b), § 4216 (b)(1), and § 4216(b)(2), of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued pursuant thereto, upon sales by such manufacturer to:

(1) a retailer

(2) a wholesaler

(3) a wholesale distributor

(4) a user or ultimate consumer

(c) The existence or non-existence under § 4216 (b) of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued pursuant thereto, particularly (without limitation) Treasury Regulations Section 148.1-5 and Treasury Regulations 46(1940),

Sections 316.8, 316.10, 316.12, 316.13, 316.14 and 316.15, of:

(1) a retailer

(2) a wholesaler

(3) a wholesaler distributor

(4) sales at retail

(5) sales at wholesale

(6) sales to wholesale distributors

(d) The methods, means, formulae, or procedures for determining or computing by a manufacturer of taxable articles of the applicable exclusion of local advertising charges from the sales prices of taxable articles under § 4216 (f) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(e) The methods, means, formulae, or procedures for determining or computing by a manufacturer of taxable articles of the credit for tax paid on tires or inner tubes under § 6416(c) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(f) The definition of the term "the purchase price" as used in § 6416(c)(1) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(g) The definition(s) of taxable and non-taxable trailers, semi-trailers, truck and bus trailers and semi-trailer chassis, truck and bus trailer and semi-trailer bodies and containers under

§ 4061(a) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(h) The methods, means, formulae or procedures for computing the applicable tax under Sections 4061(a) and 4216(b) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto on a projected or estimated basis instead of upon an article by article basis.

As used in these requests, the terms "private rulings and/or letter rulings" include (without limitation) both ordinary letter rulings, unpublished private rulings, and those portions of the responses to Technical Advice requests that are or were intended for issuance to taxpayers.

(2) The files including correspondence analysis and submissions of fact applicable to the issuances of:

Revenue Ruling 62-68, 1962-1 CB 216
Revenue Ruling 68-254, 1968-1 CB 479
Revenue Ruling 68-202, 1968-1 CB 477
Revenue Ruling 68-519, 1968-2 CB 513
Revenue Ruling 69-394, 1969-2 CB 206
Revenue Ruling 54-25, 1954-1 CB 258
Revenue Ruling 54-448, 1954-2 CB 412
Revenue Ruling 54-61, 1954-1 CB 259
Revenue Ruling 283, 1953-2 CB 425
Revenue Ruling 62-221, 1962-2 CB 251
Revenue Ruling 63-238, 1963-2 CB 519
Revenue Ruling 58-287, 1958-1 CB 426
Revenue Ruling 60-241, 1960-2 CB 329
Revenue Ruling 59-74, 1959-1 CB 350
Revenue Ruling 59-163, 1959-1 CB 353
Revenue Ruling 65-9, 1965-1 CB 491
Revenue Ruling 60-185, 1960-1 CB 412
Revenue Ruling 69-580, 1969-2 CB 209

Revenue Ruling 69-568, 1969-2 CB 209
Revenue Ruling 71-240, 1971-1 CB 372
Revenue Ruling 68-509, 1968-2 CB 508
Revenue Ruling 70-54, 1970-1 CB 218
Revenue Ruling 73-231, IRB 1973-21,11

(3) Communications with respect to these private rulings and/or letter rulings received by the Internal Revenue Service from persons outside the Executive Branch of the United States Government (including, without limitation, members of Congress, Congressional staff members, and persons acting on behalf of the parties seeking rulings), together with the responses of the Internal Revenue Service to these outside communications. The communications requested include (without limitation) letters, conference memoranda, and memoranda of telephone conversations.

(4) So much of the letter ruling indexing system(s) of the Internal Revenue Service as will enable us to ascertain whether additional unpublished private rulings and/or letter rulings, similar to those described in Paragraph 1 above, have been issued by the Treasury. Specifically (but without limitation), we have in mind (a). the "Precedent File" (and/or the "Reference File") which we understand is classified and indexed by the Excise Tax Branch by (Internal Revenue) Code Sections, and (b). the "Non-Precedent File", which we understand is maintained by the Excise Tax Branch chronologically and alphabetically by names of the taxpayers.

It is our expectation that the requested materials will not contain any data that can reasonably be characterized as "trade secrets and commercial or financial information" within the scope of subsection (b)(4) of 5 U.S.C. § 552;

however, if the requested materials contain secrets or information of this sort, we individually and jointly consent to the deletion of this data prior to the release of the material. Please keep in mind, when undertaking to make deletions, that it is our object to ascertain (1) what private rulings and/or letter rulings were issued during the period specified above applicable to the subject matter more fully set out in Paragraph 1 above, and (2) to whom, and (3) what the unpublished private rulings and/or letter rulings held, and (4) the bases and/or arguments for and/or against such holdings.

This request does not relate to "inter-agency or inter-agency memorandums or letters" within the scope of subsection (b)(5) of 5 U.S.C. § 552. Specifically, we are not requesting those portions of the responses to Technical Advice requests which are or were intended for the guidance of Internal Revenue Agents. However, access is requested to those portions of Technical Advice requests that are or were intended for issuance to taxpayers.

Reasonable charges for copying the requested documents will be paid. If it appears that the copying charges will amount to $50.00 or more, please notify us so that we can comply with the provisions of Treasury Regulations § 601.702(c)(5), relating to contracts for payment of copying fees.

The addresses of the undersigned and of our attorneys for notification purposes are as follows:

Fruehauf Corporation,
P. O. Box 238,
Detroit, Michigan 48232

William E. Grace,
Fruehauf Corporation,
P. O. Box 238,
Detroit, Michigan 48232

Robert D. Rowan,
Fruehauf Corporation,
P. O. Box 238,
Detroit, Michigan 48232

George D. Webster, Esq.,
Webster & Kilcullen,
1747 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006

Milton J. Mehl, Esq.,
Mehl, Williams, Cummings & Truman,
2012 Continental Life Building,
Fort Worth, Texas 76102

In order to be of assistance to you, we furnish you the following names of some of the manufacturers who may have requested private rulings and/or letter rulings with reference to the subject matters covered by Paragraphs 1 and 2 above:

1. American Motors Corporation, 14250 Plymouth Road, Detroit, Michigan 48232
2. Black Diamond Enterprises, Inc., Euclid Avenue, Bristol, Virginia 24201
3. Brown Trailer Division, Clark Equipment Company, P. O. Box 410, Michigan City, Indiana 46360
4. Chrysler Corporation, Box 1919, Detroit, Michigan 48231
5. Dana Corporation, P. O. Box 58, Chelsea, Michigan 48118
6. Dorsey Trailers, Inc., Elba, Alabama, 36323

7. Ford Motor Company, Inc., American Road, Dearborn, Michigan 48121
8. General Motors Corporation, 3044 W. Grand Boulevard, Detroit, Michigan 48202
9. Gindy Manufacturing Corporation, Downingtown, Pennsylvania 19335
10. The Heil Company, Box 593, Milwaukee, Wisconsin 53201
11. Highway Industries, Inc., Highway Trailer Div., 405 E. Fulton St., Edgerton, Wisconsin 53534
12. Lufkin Trailers, Division of Lufkin Industries, Inc., P. O. Box 848, Lufkin, Texas 75902
13. Peabody Galion Corporation, Box 607, Galion, Ohio 44833
14. Perfection Cobey Company, Division of Harsco Corp., South East Street, Galion, Ohio 44833
15. Strick Corporation, 225 Lincoln Highway, Fairless Hills, Pennsylvania 19030
16. Utility Trailer Manufacturing Co., P. O. Box 1299, City of Industry, California 91747
17. Timpte, Inc., 5990 N. Washington St., Denver, Colorado 80216
18. Trailmobile Division, Pullman Incorporated, 200 S. Michigan Avenue, Chicago, Illinois 60604

Your prompt attention in this instance is appreciated.

Very truly yours,

FRUEHAUF CORPORATION, and
WILLIAM E. GRACE, and
ROBERT D. ROWAN

/s/ By: GEORGE D. WEBSTER
Attorney

/s/ By: MILTON J. MEHL
Attorney

GDWand MJM:bj

cc: Mr. Peter P. Weidenbruch, Jr.
Assistant Commissioner (Technical),
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D. C. 20224

cc: Mr. John F. Hanlon,
Assistant Commissioner (Compliance),
Internal Revenue Service,
1111 Constitution Avenue, N.W.
Washington, D. C. 20224

INTERNAL REVENUE SERVICE
Washington, D.C. 20224
July 24, 1973

In reply refer to: CP:D

Mr. George D. Webster
Webster & Kilcullen
1747 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D.C. 20006

Dear Mr. Webster:

This responds to the June 26, 1973 letter signed by you and Milton J. Mehl as attorneys for Fruehauf Corporation, William E. Grace, and Robert D. Rowan, requesting permission pursuant to the Freedom of Information Act to inspect and copy a variety of letter rulings, technical advice memoranda, and other records pertaining to the confidential tax affairs of eighteen identified and also unidentified taxpayers. In addition your letter requested permission to inspect and copy various intra-agency memoranda and workpapers pertaining to twenty-three published Revenue Rulings. We also have a July 17, 1973 letter signed by you and Mr. Mehl on the letterhead of Mr. Mehl's law firm.

To the extent your request seeks "routine" but not "reference" files of letter rulings and technical advice memoranda, our records of dispositions indicate that excise tax "routine" files for years prior to 1959 and for certain later years are no longer in existence. In addition we have no practicable way of ascertaining the existence of "routine" excise tax files for unnamed taxpayers. With respect to any identifiable records covered by your request, it would appear that exemptions under the Freedom of Information Act apply.

Exemptions in 5 U.S.C. 552(b) applicable to your request include matters that are (3) specifically exempted from disciosure by statute including 26 U.S.C. 6103 and 7213 and 18 U.S.C. 1905, (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential, (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency, and (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency. These exemptions are asserted and your request is denied.

Reference is also made to H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966), stating:

> • • • an agency may not be required to make available for public inspection and copying any advisory interpretation on a specific state of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases.

For excise tax matters the index-digest reference card file is indexed by subject matter. These files include digests of letter rulings and technical advice memoranda classified as "reference", and other items such as Revenue Rulings, court cases, and technical studies, which are indexed for internal reference purposes. A substantial portion of the letter rulings and technical advice memoranda are classified as "routine" and indexed only by the name of the taxpayer.

It is also the position of the Internal Revenue Service that until an interpretation is published in the Internal Revenue Bulletin it has not been adopted by the Service. The Bulletins are published and copies offered for sale and the interpretations set forth therein are indexed in the

monthly, quarterly and semi-annual editions and each Cumulative Bulletin has an Index. Additionally, there is an Index-Digest System that provides finding lists and topically arranged digests of items published in the Bulletins. Accordingly, we believe that the Service has met the requirements of 5 U.S.C. 552(a)(2) with respect to indexing those interpretations which have been adopted by the Service and are not published in the Federal Register.

At any time within 30 days after the date of this letter, you may file an appeal of our determination to the Commissioner of Internal Revenue. The appeal must be in the form of a statement signed by the appellant and mailed to the Commissioner of Internal Revenue, 1111 Constitution Avenue, N.W., Washington, D.C. 20224. The statement must contain: (1) The appellant's name and address, (2) The identification of the records requested, (3) The date of the request and the date of the letter denying the request, and (4) A request that the Commissioner consider the denial.

In the event of denial upon appeal, the Freedom of Information Act makes judicial review available in the U.S. District Court in the District in which the complainant resides, or has a principal place of business, or in which the agency records are situated. To the extent that the records you request exist, they would be under control of the National Office, Washington, D.C.

You may be aware that questions about the index-digest reference card files, letter rulings and technical advice memoranda under the Freedom of Information Act were considered in *Tax Analysts and Advocates* v. *Internal Revenue Service*, Civil No. 841-72 (D. D.C.), June 6, 1973 order and opinion by the court which has been stayed pending a decision by the Government as to appeal.

In addition many of the documents requested are denied as prohibited from disclosure by 26 U.S.C. 6103 and the

regulations thereunder. These regulations at 26 C.F.R. 301.6103(a)-1(a)(3) provide a broad definition of "return" which encompasses letter rulings, that portion of technical advice memoranda furnished taxpayers, communications with taxpayers relating to letter rulings and technical advice memoranda, as well as information on index-digest reference cards and other documents referring to the tax affairs of identified taxpayers. The prohibition in section 6103 of the Internal Revenue Code and the regulations covers much of the manufacturers excise tax matters you request.

Copies of this letter are being mailed to the parties you indicate in your letter as shown below.

Sincerely,

/s/ JOHN F. HANLON
John F. Hanlon
Assistant Commissioner
(Compliance)

cc: Mr. Milton J. Mehl
Mehl, Williams, Cummings & Truman
2012 Continental Life Building
Fort Worth, Texas 76102

Fruehauf Corporation
P. O. Box 238
Detroit, Michigan 48232

William E. Grace
Fruehauf Corporation
P. O. Box 238
Detroit, Michigan 48232

Robert D. Rowan
Fruehauf Corporation
Detroit, Michigan 48232

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
August 22, 1973

In reply refer to: C

Mr. George D. Webster
Mehl, Williams, Cummings & Truman
20th Floor, Continental Life Bldg.
Fort Worth, Texas 76102

Dear Mr. Webster:

This is in response to your letter of July 30, 1973, in which you appeal the determination of Assistant Commissioner Hanlon denying your request to inspect and copy a variety of letter rulings, technical advice memoranda, and other records.

Your request and appeal have been carefully considered. It is believed, however, that Mr. Hanlon properly denied your request and his determination is affirmed. In addition it is our view that a court in the proper exercise of its equity jurisdiction under the Freedom of Information Act would not require production of the records requested.

With respect to *Tax Analysts and Advocates* v. *Internal Revenue Service*, Civil No. 841-72 (D. D.C.), an order has been entered to stay the June 6, 1973 order of the court during the pendency of an appeal filed on behalf of the Service.

Sincerely,

/s/ DONALD C. ALEXANDER
Donald C. Alexander
Commissioner